* Together with No. 703, Postell et al. v. United States; No. 706, Andrews et al. v. United States; No. 707, Owens et al. v. United States.

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IN THE

Supreme Court of the United States

October Term, 1965.

No. 607.

FRANK J. ANDREWS,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

JACOB KOSHMAN,
1125 Spruce Street,
Philadelphia, Pa. 19107
Counsel for the Petitioner.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

No.

FRANK J. ANDREWS,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FRANK J. ANDREWS, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on June 17, 1965.

OPINION BELOW.

The opinion of the court below (Appendix B, *infra*, pp. 3A-18A) is reported at 347 F. 2d 207.

JURISDICTION.

The judgment of the court below (Appendix C, *infra*, p. 19A) was entered on June 17, 1965. A timely petition for rehearing was denied on August 30, 1965 (Appendix D, *infra*, p. 20A). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether, where newspaper accounts obviously prejudicial to the petitioner were published in the course of a trial lasting 18 court days that were followed by three and a half days of jury deliberation, it was proper for the trial judge to deny the request of petitioner's counsel, made in respect of each publication, that the members of the jury be examined on *voir dire* to ascertain whether they had seen the articles in question.

2. Whether the trial judge's charge was improperly coercive under the doctrine of *Jenkins v. United States,* 380 U. S. 445, particularly when it was repeated after the jury had already deliberated for three days.

3. Whether the instruction to the jury on reasonable doubt, wherein the trial court also stated "it is not an excuse not to make a verdict," was prejudicially erroneous.

4. Whether the entire charge to the jury on willfulness was prejudicially erroneous.

5. Whether it was prejudicial error for the trial court to permit the prosecuting attorney in the presence of the jury after the witness for the government had invoked his privilege against self-incrimination to ask questions which he knew the witness would refuse to answer on the grounds of self-incrimination.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provisions and statutes involved are set forth in Appendix A, *infra,* pp. 1A-2A.

STATEMENT.

Petitioner Frank J. Andrews was named in a 35-count indictment together with eight other defendants. After a trial that consumed 18 court days, the jury deliberated for three and a half days more. Petitioner was then convicted on Count 1, the conspiracy count, while the jury disagreed as to him on Counts 2-33, the substantive counts in which he was also charged. He was sentenced to the maximum permitted by law, five years' confinement and a fine of $10,000, and that judgment was affirmed on appeal.

The statement that follows sets forth only such relevant facts as will sufficiently place in their setting the questions presented in the present petition.

A. The Indictment.

Count 1, the only one of which petitioner was convicted, charged a conspiracy by all of the defendants[1] to evade the excise tax on wagers (I. R. C. 1954, § 4401) and to file false returns in violation of I. R. C. 1954, §§ 7201, 7206(1) and 7206(2), said conspiracy being in violation of 18 U. S. C. § 371.

The only overt acts alleged against Frank Andrews were (No. 1) that on February 2, 1959, he executed a rental agreement with the defendants Daniel Andrews, Owens, and Whitley, and (No. 8) that on July 2, 1961, he entered the Sportsman's Club, 333 Central Avenue, Newport, Kentucky.

Counts 2-32 charged all defendants with the attempt to evade the wagering tax on the "business of accepting wagers and conducting a lottery for profit, commonly known as and called 'numbers'," in which it was alleged all the defendants were engaged, for each month from August 1961 through February 1959, by filing false returns therefor, in violation of § 7201 (I. R. C. 1954).

1. Defendant Daniel Andrews was severed because of illness.

Count 33 charged all defendants with causing two telephone companies to furnish telephones for an unlawful purpose, viz., to transmit numbers bets in violation of those companies' tariffs, in violation of 47 U. S. C. §§ 203(2) and 501.

Petitioner was not named in Counts 34 or 35.

B. The Evidence.

On February 2, 1959, petitioner leased the premises at 330 Central Avenue, Newport, Kentucky, to a partnership consisting of the defendants Daniel Andrews, Owens and Whitley, the lease (Govt. Ex. 128) providing (233a) [2] that "the partnership will procure and pay for and maintain all licenses and pay all taxes, state, federal, municipal or otherwise required for the conduct of any business which the business or any of the partners or servants or employees may conduct and operate in and on the buildings and premises hereby leased to them, including all real estate and personal property taxes."

The partnership openly conducted wagering operations on the premises, and the partners and most of their employees duly registered as required by the wagering tax provisions of the Internal Revenue Code (Govt. Ex. 1-121).

Inasmuch as the jury disagreed with respect to petitioner on the substantive counts naming him, the evidence adduced thereunder need not be stated.

The evidence relating to petitioner on the conspiracy count other than that he had leased the premises consisted of a showing that certain personal bills were paid by partnership checks (1429a-1544a), some checks which had been given to and were endorsed by the partnership were among deposits in petitioner's bank account (1133a-1161a) and on one occasion he had helped an individual to get a job with the partnership (589a-593a, 617a, 625a-627a, 632a-634a).

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2. The letter "a" refers to the petitioner's Appendix below, copies of which have been filed with the Clerk of this Court.

C. Vital Occurrences at the Trial.

1. *The Prejudicial Newspaper Publicity.*

On no less than nine occasions during the trial, counsel for petitioner brought to the attention of the court newspaper headlines and articles, alleged to be prejudicial, some of them referring to matters that had been excluded (354a, 483a, 654a, 1249a, 1390a, 1460a-1461a, 1995a-1996a, 2077a-2078a, 2136a-2137a, 2256a-2259a). In each instance counsel requested that the members of the jury be examined on *voir dire* to ascertain whether they had seen the articles in question, and in each instance the judge refused the request, saying on the first few of these occasions that he would not assume that the jurors would not heed his admonition not to read about the case in the newspapers (354a-356a, 483a-484a).

The jury was not locked up either during the trial or during the three nights that intervened from the beginning to the close of its deliberations.

The prejudicial newspaper publicity was as follows:

(a) On July 2, the trial court sustained an objection to the prosecution's showing that the numbers game on the 333 Central Avenue premises was rigged (290a-293a), the court saying, "It's highly inflammatory and just to show they are running a crooked game, if that's the only purpose for it, which has nothing to do with what they owe the Government on the tax" (293a).

Next morning, a headline on the front page of *The Cincinnati Enquirer,* Kentucky Edition, read, "U. S. Stopped From Showing Numbers Selection 'Rigged'" (Def. Ex. X).

(b) On Wednesday, July 4, the banner headline on *The Kentucky Post Times and Star* proclaimed "Gaming Club's 'Secrets' Bared" (Def. Ex. X-1). The trial judge

admitted (483a) that "it is a rather glaring headline," but again denied the motion to examine the jurors on *voir dire* because he would not "have the jury catechized every morning before we start court to see whether or not they have violated their oath and violated their obligations as jurors to observe the court's instructions, simply because the newspapers are writing up this case" (484a).

(c) On July 6, *The Cincinnati Enquirer*, Kentucky Edition, had on its front page a picture of Mary Jo Williams, who had testified at length on the preceding day (582a-635a), with the caption "Widow Terrified, Denies Andrews' Story" (Def. Ex. X-2). A renewed motion for a *voir dire* examination of the jury was denied for the reasons theretofore given (654a).

(d) The same paper's story on July 11 headed, "Andrews' Huge Deposits Shown," was the subject of another motion for *voir dire* examination, which was denied (1249a).

(e) A similar motion was made and denied on the following day (1390a) in respect of the July 11 edition of the *Kentucky Post and Times Star* (Def. Ex. X-3-0), which had first page headlines reading "Say Checks For Andrews On Numbers. Deposited to Personal Account, Witness Testifies."

(f) Later on the same day an identical motion was made and denied (1460a-1461a) in connection with the same paper's issue of July 12 (Def. Ex. X-3), the first page of which had a story headed "Aide Links Andrews With Club" that continued at length on p. 22.

(g) Petitioner's motion for similar questioning of the jury was again denied a few days later (1995a-1996a); on that occasion the basis for the motion was a headline in *The Kentucky Post and Times Star* of July 17 reading "Unwilling Witness Tells of Phone Call" (Def. Ex. X-5), and one in the July 18 issue reading, "Government Near End in Racket Case" (Def. Ex. X-6). When counsel was

asked by the court whether he was able to represent that the jurors had in fact violated the court's admonitions, he replied (1996a), "No, I do not know that. It would only be determined after we inquired on *voir dire.*"

(h) On the following day, counsel complained of a *Cincinnati Enquirer* headline reading "U. S. Plays Trump Card in Andrews Tax Evasion Trial" (Def. Ex. X-7), saying (2077a), "* * * we suggest to the Court no one heard of this language before in the courtroom, that it is a news editorial and prejudicial to these defendants, and for those reasons we move to inquire as to whether the jurors have read this paper, heard any similar radio news account or telecast account." Once more the motion was overruled (2078a).

(i) Later on the same day, a further motion for examination of the jurors was made in respect to a *Kentucky Post* headline dated July 19, with a banner first page headline reading "Recess Seen in Numbers Trial" (Def. Ex. X-9), the text of which set forth petitioner's contention that he was only a landlord after asserting that some of the papers seized by raiding Internal Revenue agents were identified by a handwriting expert as bearing his name (2136a-2137a): "If any of the jurors have read that, we believe that misstatement by the paper would be highly prejudicial to the rights of my defendant." Once more, "for the same reasons," motion overruled (2137a).

2. *The Charge as to Hung Juries and the Duty of a Jury to Reach Agreement.*

The judge's charge in chief extends to 55 pages of the transcript (2178a-2224a). On the second page he said:

> "We have in this country I am afraid all too frequently what is known as hung juries, when the jurors are unable to agree. While, of course, the purpose of the jury trial is that it would be tried by men of vary-

ing degrees of experience and yet they are men who are supposedly capable of making up their minds on a given set of facts. All too frequently we have, I say, what is known as a hung jury which is no credit to the individual juror or to the jury itself or to the system or to the Court. I suppose that if there would be enough hung juries we would probably abolish the jury system for there has to be something to be progressive in the administration of justice and not a stumbling block." (2179a)

In the course of defining reasonable doubt, he charged:

"The term *reasonable doubt,* as used in this instruction, is best defined by a use of the term itself. Don't be confused by reasonable doubt. It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror" (2184a).

The judge further charged (2185a-2187a):

"But before you make up your mind, gentlemen, you should give due regard and consideration to the reasoning and recollection and understanding of your fellow jurors. I am confident that every man on that jury, possibly none of you have ever known each other before you served together on this jury, but let me assure you that each man on that jury is just as anxious to do the right and proper thing in this case as you are. And before you make up your verdict, and I firmly believe that, before you make up your verdict or make up your mind what the verdict should be, you should give due regard to the reasoning and recollection, arguments, of your fellow jurors.

"A reasonable man is an awfully good kind of a citizen. I know there are those who have won fame by being stubborn and hardheaded. Somehow or other, I think the man that really keeps things going in this

world is the reasonable man, the man who is willing to give and take, who is willing to accede that the other fellow's views might, after all, not be entirely nonsensical.

* * *

"I have never served on a jury, but I have known a lot of people who have and I have been told that you go to a jury room and some one or two or more of the jurors immediately announce what the verdict will be and that they will stay there all day or all night or some other such extravagant statement, mistaking I am afraid hardheadedness and stubbornness with strong-mindedness. Well, such a person is not a good juror, not a good citizen, because he doesn't understand the meaning of an oath. Your oath carries through on that as it does on other things. So I ask you when you go to your jury room to see if you can make up your mind and make a verdict in this case. If you can't, you can't and I wouldn't undertake to require you to make a verdict. I couldn't if I wanted to and I wouldn't if I could. That is your free prerogative, but I do want you to understand that it is a responsibility which should not be lightly shirked. It is very easy to get into the jury room and not too concerned, 'Oh, well, let's let some other jury decide it. We just won't make any verdict.' I hope you won't take that attitude and I have every confidence that you won't."

This was on the morning of July 25, a Wednesday.

On the afternoon of Saturday, July 28, the Court of its own motion told the jury (2262a-2263a):

"The case was finally submitted to you, as I recall, about 1:00 o'clock on Wednesday and here it is Saturday afternoon and the case does not, could not, it would seem to me, require nearly that much time to decide. I don't know whether you are assuming a responsibility that makes you feel you have to examine each bit of evidence by way of exhibit, in other words,

whether you can't see the woods for the trees. This case has covered—this is the end of five weeks trial and we had four weeks of testimony and two days, I might say, of argument. It would be practically impossible to expect the jury to take up every conceivable bit of evidence by way of exhibit that has been offered in this case, but to look at the whole case, examine the whole thing as a whole as I tried to outline to you, draw what reasonable inferences may be drawn from the case. The exhibits are a part of the evidence, an important part of the evidence, but they are not all of the evidence. And I am going to ask you to resume your deliberations, taking into consideration that many of these counts in this indictment are very similar. It would seem that if a person were guilty or not guilty of one, the same thing would apply to many of the others. You have eight defendants here."

The next to last sentence quoted was objected to, without avail (2264a-2265a).

3. *The Charge on Reasonable Doubt.*

In addition to, and immediately following the reference to reasonable doubt previously quoted (*supra*, p. 8) the district court instructed the jury:

"But I think as common sense men of everyday affairs, you do understand the difference between what is reasonable and what is unreasonable, and so this term reasonable doubt means just what it says. It is a doubt based upon reason, not some inconsequential doubt that might flit through the mind of a juror, not some slight mental hesitation that might guide you in determining the less significant affairs of everyday life; but a doubt for which there is a reason, such a doubt as would guide you in determining the course of action in the conduct of your ordinary everyday living; a doubt based upon reason, not some shadowy, inconsequential misgiving." (2184a)

4. *The Charge on Intent.*

In his charge, the trial judge told the jury (2180a) that "this is a tax evasion case," and a little later said (2182a):

> "Your question is simple and narrow: Did they pay the taxes due under the law? * * * Your business is this: Did they pay the taxes under the law?"

Despite appellant's Request for Charge No. 6 (2163a-2164a), the district court instructed the jury as follows:

> "You will notice when I refer to this indictment a little later that it charges that these defendants did 'willfully and knowingly' do certain things. 'Willfully, and knowingly' implies what went on in their minds. This is offense which requires a criminal intent and therefore you must find, before you can find these defendants or any of them guilty, that they intended, that they committed a violation of the law intentionally. The question of intent is always somewhat confusing unless we look at it rationally and rationalize about it. So far, science has never reached the place where you can take some sort of an instrument and look into a man's head or into his brain and see what he is thinking. That is not visible; thought, after all, is not a substance, it is not a mass. The brain is a mass, but the thought is not. What you may intend to do is not reflected in any of your physical parts or what you are thinking is not reflected in any of your physical parts. And so the law is bound then to accept the next best text and that is that a person is presumed to intend the natural consequences of his own deliberate acts. And you have to judge what is in his mind by what he does and the reasonable inferences which may be drawn from it. The United States is not required to produce someone here to establish beyond a reasonable doubt just what these defendants had in their minds at all stages of this alleged offense, but it shows by evidence

and introduces witnesses and examines these witnesses in your presence and for your benefit and subject to cross-examination by the defendants, to bring out the facts and then you, from those facts, are to determine whether or not these defendants or any of them or all of them intended to defeat the tax collector in his efforts to receive from them the amount of taxes which the United States says were due. So, you are not to be confused by that thing intent. That, again, is not something to hide behind to keep from making a verdict. You reach that fact as you would any other fact. A person intends, under the law the natural consequences of his own deliberate acts and you have a right to determine that question of intent by the whole evidence in the case and by the actions and conduct of the defendants." (2190a-2192a)

Objection was specifically made that the charge did not include willfulness as an essential element as follows:

"In the first portion of your charge to the jury, you made the statement that the issue is narrow and simple, it is a tax evasion case and a few moments later you said the question is, did they pay the taxes due under the law, and while Your Honor did charge the jury that it must be knowingly, willfully and unlawfully, I believe that Your Honor gave undue emphasis to the fact that the only question is did they pay taxes due under the law. I think also of equal importance and maybe of greater importance is the fact that did they do it unlawfully, willfully and knowingly, and I ask the Court to perhaps correct to the jury the misapprehension that the only question offered is, did they pay taxes due under the law." (2229a-2230a)

This objection was overruled (2230a).

On the morning of Friday July 27, after a day and a half of deliberation, the jury asked for further instructions on the conspiracy charge, count 1 (2245a).

Following some three pages of explanation (2245a-2248a), counsel for this appellant requested clarification—"you said the mere fact that he knew that there was an illegal operation there would make him guilty" (2249a)—the Court further charged as follows:

> "Bear in mind, as I have emphasized, the day before yesterday in my charge, the charge here is the withholding of this excise tax, that is the offense charged, and the knowledge which is set forth in the charge is knowledge that the tax purposes were being defeated and that the government was being defrauded of its taxes. That is the charge contained in the indictment. *As I told you, it is a narrow proposition. Did they account for the tax or did they not,* and if they didn't, who was responsible or who participated in it under the general rule I have given you, under the law of conspiracy." (2250a-2251a, emphasis supplied.)

Again there was objection and again it was overruled; the colloquy was in these terms (2252a):

> "Mr. Weintraub: Your Honor again said to the jury, just a moment ago, that the issue is narrowed down to one thing, did they pay the taxes. Now, I think in view of that statement, you ought to tell them that it is not only that, but did they wilfully fail to pay, because when you tell the jury that the only question is—it is not only did they fail to pay the taxes——
>
> The Court: I think I have covered that all sufficiently.
>
> Mr. Weintraub: Well, I think you leave them with the issue is, did they fail to pay the taxes. It isn't only that but did they wilfully and deliberately fail to do it.
>
> The Court: Overruled. I have covered that repeatedly."

5. *Questions Concerning Prior Grand Jury Testimony Put to Witness Who Had Invoked Privilege Against Self-Incrimination.*

A witness, James Harris (1648a-1666a) testified to a conversation with this petitioner in June or July 1959 in which the latter inquired whether Harris would be interested in the Copa Club at 333 Central Avenue (1649a-1651a). Harris testified that there was no reference in that conversation to the numbers business at the Copa Club (1653a). Thereupon, in response to further questions, he admitted having testified before the grand jury (1653a, 1656a). He was then read an answer purportedly given by him before that body (1656a), in which he quoted the appellant as saying, *inter alia,* "I don't need the Copa Club, I got the numbers going for me," and also "he said there was no numbers involved, so all I want you to do is to book the shows and operate the club and so forth."

Motion for a mistrial was made and overruled (1656a-1657a), and in a colloquy, the defense's request for the grand jury minutes from which the prosecution was reading was denied (1657a-1661a).

Following an admonition by the court that the prosecution's question was not to be considered as any evidence against the defendants (1662a), the witness' previous grand jury answer was again read to him; he claimed the privilege against self-incrimination (1663a, 1665a). Objection to another question based on a grand jury answer was sustained because non-contradictory (1663a-1664a). The prosecution recurred to a further grand jury answer that had this petitioner saying to the witness that if the witness "would go back to the bottoms they would put together this numbers racket and consolidate it into one racket," again there was objection, again the witness invoked privilege, and again a motion for mistrial was made and overruled, the court simply repeating the admonition that the questions were not evidence against the defendants (1664a-1665a).

Once more the witness was read one of his grand jury answers concerning his suggesting the name of one Holtzman to this petitioner to take over the Copa Club, "so I called Mr. Holtzman and he talked to Mr. Andrews and it was only a matter of a few days until Mr. Holtzman was working, running the club for Mr. Andrews;" objection was sustained, and a motion for mistrial was denied (1665a-1666a).

D. The Opinion Below.

On appeal, the court below affirmed, largely in reliance, so far as the question of adverse newspaper publicity was concerned, on its own recent decision in *Sheppard v. Maxwell,* 346 F. 2d 707, pending on petition for certiorari, No. 490, this Term. It relied on the fact that the present case was less flagrant than that one; that here there had been no motion for change of venue; and that the case was factually different from its own earlier decisions in *Briggs v. United States,* 221 F. 2d 636; *Marson v. United States,* 203 F. 2d 904; and *Stone v. United States,* 113 F. 2d 70.

It criticized the trial judge's charge, saying (*infra,* Appendix B, p. 11A):

> "Referring to reasonable doubt he said: 'It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror.' We do not believe that this language is desirable. While it may be argued that this simply tells the jury that it is not any captious doubt which should cause them to withhold a verdict if otherwise convinced, it seems to us to place the Court in the position of urging a verdict with more emphasis than is appropriate."

But, taking the charge as a whole, the court below concluded that petitioner was not prejudiced.

As to the other issues that were presented by petitioner the court found no reversible error citing Rule 52(a) Fed. R. Crim. P.; 28 U. S. C. § 2111.

REASONS FOR GRANTING THE WRIT.

First. The ruling sought to be reviewed represents, so far as we are aware, the first decision by a Federal appellate court holding that, after plainly prejudicial newspaper articles concerning the trial that appear during the trial are called to the trial judge's attention, he may refuse requests to question the jury whether they have seen the articles, simply because the jurors had previously been admonished, in generalized terms, not to read any newspapers. Such a holding turns the presumption that jurors will heed the instructions given them into one that is conclusive, i.e., into a rule of law. But every other circuit that has ever considered the question, including the court below in earlier cases, has held that the rule is precisely to the contrary.

1. By way of preliminary, we note that the trial judge never once undertook to rule that the newspaper accounts would not have been prejudicial if all of the jurors had read them.

No such ruling, very plainly, would have been justified by this record. For here the newspaper headlines set forth matters that the court had advisedly withheld from the jury, viz., "U. S. Stopped From Showing Numbers Selection 'Rigged' " (Def. Ex. X), this after the trial judge had declared such evidence "highly inflammatory" (293a). The same article characterized petitioner as "master controller" of a gigantic numbers operation out of Newport after the trial judge had ordered the jury not to consider an answer, given in response to a leading question, that the witness had heard several people call petitioner the "Big Man" or the "Boss" (609a-610a). In another instance, the offending publicity was expressed in terms that exuded prejudgment of guilt, viz., "King of the Numbers Racket" (354a). Indeed, as the trial judge himself recognized (483a), some of the headlines were "glaring."

It is therefore no answer to say that the publicity in the Dr. Sam Sheppard case was a more shocking instance of journalistic incursions on the basic right to a fair trial; that case, whatever its ultimate outcome—as noted, it is now pending here as No. 490—is wholly different in two respects. First, it was a collateral attack on a State court judgment ten years later, not direct review of an original Federal conviction as here; second, even in the *Sheppard* case, the trial judge did question the jurors whether they had heard a particularly offensive broadcast. 346 F. 2d at 751.

2. The real vice here is that the trial judge refused to make the inquiry that the court below had earlier held was required (*Marson v. United States,* 203 F. 2d 904, 911): "Upon the showing of appellant's counsel, it was the duty of the court to interrogate the members of the jury to ascertain whether they had seen the newspaper articles and, if so, whether it had created any prejudice in their minds."

Other circuits, without exception, have uniformly enforced the duty of making inquiry on request.

Representative decisions include *Coppedge v. United States,* 272 F. 2d 504 (C. A. D. C.), where the court held inadequate a very generalized inquiry; *United States v. Bentvena,* 319 F. 2d 916, 934 (C. A. 2), where a juror who was shown the offending account by his wife but refused to discuss it with her was none the less discharged from the jury; *United States v. Vita,* 294 F. 2d 524 (C. A. 2), certiorari denied, 369 U. S. 823, where a juror who admitted reading the prejudicial article was excused and an alternate substituted; *United States v. Carlucci,* 288 F. 2d 691, 694-695 (C. A. 3), certiorari denied, 366 U. S. 961, where the judge "meticulously questioned" every juror; *United States v. Milanovich,* 303 F. 2d 626, 629-630 (C. A. 4), certiorari denied, 371 U. S. 876, where the court of appeals emphasized the duty of the trial judge to determine whether

the prejudicial matter had reached any juror; and *Accardo v. United States,* 298 F. 2d 133, 136 (C. A. 7), where the court said that the district judge "should have, by the careful examination of each juror, out of the presence of the others, determined the effect of the articles on those who had read them and whether they had discussed the articles with others." In that case, the Seventh Circuit said, in language fully applicable here, that (298 F. 2d at 136) "The judge's general admonitions at the beginning of the jury selection, his assumption of their effectiveness, and his instructions, were inadequate protection."[3]

Estes v. United States, 335 F. 2d 609, certiorari denied, 379 U. S. 964, cited—and apparently relied on—by the court below, was wholly different; there no request for inquiries directed to the jurors was made until after the close of the evidence. Here, to the contrary, such a request was made on each occasion that the prejudicial material appeared.

Except for the ruling now sought to be reviewed, we know of no appellate decision approving the denial of a motion for *voir dire* examination of the jury to ascertain whether any jurors had in fact seen the prejudicial publicity. The unanimity with which Federal trial judges throughout the land have made such inquiries even without express request once the existence of improper newspaper comment is made manifest demonstrates that, by the consensus of judicial opinion, a generalized admonition not to read about the case in the newspapers is deemed wholly insufficient once the prejudicial accounts have in fact appeared.

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3. In numerous other cases involving prejudicial newspaper publicity, the reports show that the trial judge in fact inquired whether the offending articles had been read by the jury. E.g., *United States v. Agueci,* 310 F. 2d 817, 831-832 (C. A. 2), certiorari denied, 872 U. S. 959; *Cohen v. United States,* 297 F. 2d 760, 763-764 (C. A. 9), certiorari denied, 369 U. S. 865; *United States v. LaBarbera,* 273 F. 2d 547 (C. A. 2); *United States v. Carruthers,* 152 F. 2d 512 (C. A. 7), certiorari denied, 327 U. S. 787; *Itow v. United States,* 223 Fed. 25, 28 (C. A. 9).

The present case, therefore, which takes a wholly different approach in a situation that recurs again and again, is in clear conflict with decisions of courts in other circuits and accordingly calls for further scrutiny here.

3. We mention, simply to show that it has not been overlooked, the suggestion of the court below that petitioner did not move for a change of venue. The short and indeed conclusive answer to this notion was given by the First Circuit in *Delaney v. United States,* 199 F. 2d 107, 116:

> "The right to apply for a change of venue is given for the defendant's benefit and at his option. He is not obliged to forego his constitutional right to an impartial trial in the district wherein the offense is alleged to have been committed."

Second. We think the judge's charge here, particularly the portion thereof given on the fourth day of the jury's deliberation (2262a-2263a; *supra,* pp. 9-10)—a portion, significantly enough, nowhere included in Appendix D to the opinion below (*infra,* pp. 17A-18A)—was improperly coercive within this Court's recent decision in *Jenkins v. United States,* 380 U. S. 445, reversing 330 F. 2d 220 (D. C. Cir.).

1. By way of preliminary, we note that the charge-as-a-whole doctrine, that venerable catch-all for sweeping under the judicial rug every inconvenient error committed at the trial, which the majority of the District of Columbia Circuit had relied on in the *Jenkins* case (330 F. 2d at 220-221), but to no avail, is subject to a logical difficulty, viz., that "We cannot speculate as to which part would be accepted by the jury * * *." *Price v. United States,* 200 F. 2d 652, 655 (C. A. 5).

Thus, here, the language that the court below deemed "not * * * desirable," because "it seems to us to place the Court in the position of urging a verdict with more empha-

sis than is appropriate," was considered cured by "the totality of the Judge's charge on reasonable doubt." But, to put the Fifth's Circuit language in the form of a question, "Which part would be accepted by the jury?"

2. Here the coercive aspect permeated the entire charge, and was moreover emphasized by being repeated after the jury had by over three days of deliberation demonstrated its inability to arrive at a verdict without coercion.

A. The trial judge early set up the hung jury as an ogre, and expressly—but quite improperly—told the jurors that a hung jury is discreditable to the individual jurors and to the jury, even to the extent of destroying the jury system (2179a, 2185a-2187a; *supra,* pp. 7-9). The law, of course, is quite otherwise; "a mistrial is as much a part of the jury system as a unanimous verdict." *Williams v. United States,* 338 F. 2d 530, 533 (C. A. D. C.).

Next, the trial judge told the jury, as to two essential elements of the offense, that they were not "an excuse not to make a verdict" (2184a) and "not something to hide behind to keep from making a verdict" (2192a). The trial judge encouraged compromise, approving "give and take" (2185a), and condemning firmness (2185a-2186a). Indeed, the trial judge said that a juror who remained steadfast was "not a good juror" and "not a good citizen" because "he doesn't understand the meaning of an oath" (2186a). Yet even the notorious *Allen* or "dynamite" charge (*Allen v. United States,* 164 U. S. 492, 501), which has yet to be condemned in its pristine form, constitutes reversible error when it fails to contain the qualification that if any individual juror still retains his views, he is not to yield his judgment simply because he is outnumbered. *United States v. Rogers,* 389 F. 2d 433, 434, 437 (C. A. 4); *Powell v. United States,* 297 F. 2d 318 (C. A. 5); *Green v. United States,* 307 F. 2d 852 (C. A. 5).

No such qualification was contained in the charge given here, before the jury retired (2179a, 2185a-2187a), yet the

court below held the charge cured by the trial court's abstractions concerning reasonable doubt.

B. But, bad as the charge was originally, its prejudicial content was compounded by the additional charge given after the jury had deliberated unsuccessfully for over three days. At that point, the trial court pressed hard for a verdict, calling attention to the lapse of time, and finally saying to the jury it did not need to examine all the evidence (2262a-2263a):

> "And I am going to ask you to resume your deliberations, taking into consideration that many of these counts in this indictment are very similar. It would seem that if a person were guilty or not guilty of one, the same thing would apply to many of the others."

Objection proved fruitless (2264a-2265a); the law that such a charge was improper was ignored (*Blunt v. United States,* 244 F. 2d 355, 367-368 (C. A. D. C.)); and the impact of the erroneous instruction was magnified because it came on the fourth day of the jury's deliberations. For, as this Court said in *Bollenbach v. United States,* 326 U. S. 607, 612:

> "Particularly in a criminal case, the trial judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

In context, therefore, the charge as supplemented was plainly and erroneously coercive. *Jenkins v. United States,* 380 U. S. 445.

Third. In this country a defendant must be given the benefit of a reasonable doubt. A reasonable doubt is "an excuse" to render a verdict of not guilty. The instruction given on reasonable doubt would prevent a jury from bringing a verdict of not guilty because they had a reasonable

doubt. And when the trial court stated "So that term reasonable doubt is used in the sense which I have undertaken here to define it to you," (*infra*, p. 18A), the petitioner was indeed gravely prejudiced. The court had stated to the jury that "It is very easy for a person in his own mind to say, 'Well, true, I have a reasonable doubt.'" (*infra*, p. 18A). If the evidence in a case is such that it is "very easy" for a juror to have a reasonable doubt there should be a verdict of not guilty. The district court instructed the jury that they should not "be confused by reasonable doubt." We submit the jury had to be confused.

Further, the instruction on reasonable doubt was fundamentally erroneous, since it reduced the content of the term to "such a doubt as would guide you in determining the course of action in the conduct of your everyday affairs." As such, it is obviously inconsistent with the philosophy expressed by this Court in *Holland v. United States*, 348 U. S. 121, 140; see also *United States v. Heap*, 345 F. 2d 170 (C. A. 2); *Scurry v. United States*, 347 F. 2d 468, 469-470 (C. A. D. C.).

With these words fresh in their ears, the jury retired and after a short interval returned the verdict of guilty against the petitioner.

Fourth. In *Ingram v. United States*, 360 U. S. 672, which, like the present appeal, involved a conviction for violating 18 U. S. C. § 371 by conspiring to evade the payment of the wagering tax, the Supreme Court said (360 U. S. at 678):

> "'[C]onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself.' [Footnote 9 omitted.] The substantive offense which Smith and Law were accused of conspiring to commit was the willful evasion of federal taxes, an offense which, even presuming knowledge of the tax law, obviously cannot be committed in the absence of

knowledge of willfulness. *Spies v. United States, supra. Cf. United States v. Falcone,* 311 U. S. 205."

The necessary result of the direction that "a person is presumed to intend the natural consequences of his own deliberate acts" was to create a presumption of specific intent inconsistent with the presumption of innocence. *Morissette v. United States,* 342 U. S. 246, 273. As there held, such a statement has no proper place in a charge relating to a criminal offense where specific intent and bad purpose are essential elements. Such instruction is condemned as fundamentally prejudicial. *Mann v. United States,* 319 F. 2d 404, 407, 410 (C. A. 5); *Chappell v. United States,* 270 F. 2d 274 (C. A. 9); *Block v. United States,* 221 F. 2d 786, 788-789 (C. A. 9).

And in his further instructions, given after the jury had requested clarification following deliberations for a day and a half, the trial judge not only failed to mention intent, but rejected the suggestion that he do so.

The heart of the supplementary instruction (2251a) was, "As I told you, it is a narrow proposition. Did they account for the tax or did they not," and the heart of the objection (2252a) was, "I think you leave them with the issue is (sic), did they fail to pay the taxes. It isn't only that but did they willfully and deliberately fail to do it."

Yet at this critical juncture, the court overruled the objection (2252a), and left the case to an obviously troubled jury as a problem in arithmetic, viz., whether the full 10% tax that the United States levies on gambling enterprises had been paid.

Since willfulness is an essential ingredient of the offense of conspiracy of which this petitioner was convicted, and since at a critical juncture of the proceedings the case was left with the jury under instructions that omitted all mention of willfulness, reversal for a new trial is required.

Fifth. The witness James Harris was sought to be impeached, in respect of his denial that his conversation

with this appellant had referred to the numbers business at the Copa Club, by means of an allegedly prior contradictory statement before the grand jury (1653a, 1655a-1656a). But in that statement, the appellant according to the witness had carefully differentiated between the Copa Club and the numbers business (1656a-1657a); the statement was therefore not contradictory.

When the answer was read again, the witness invoked privilege, and did so with respect to several other prior grand jury answers (1663a-1665a).

The resultant error is denounced by Wigmore and in two Circuits, because, in fact, it brings before the trial jury matter that is incompetent.

Wigmore says (3 *Evidence* (3d ed. 1940) § 1043):

> "It ought to follow that, where the witness *now* claims to be *unable to recollect* a matter, a former affirmation of it should be admitted as a contradiction. But Courts have usually forbidden this, because the improper effect is apt to be to give a testimonial value * * * to the former statement; its aspect as a mere contradiction being naturally overshadowed."

Accordingly, both the District of Columbia Circuit and the First Circuit have held it reversible error to attempt to contradict with prior testimony a witness who at the trial is unable to recall the transaction about which he is being questioned.

In *Young v. United States,* 214 F. 2d 232 (C. A. D. C.), it was held reversible error to read before the trial jury, on the theory of refreshing recollection, the witness' prior grand jury testimony (p. 237):

> "* * * Government counsel was permitted to read aloud much more of (the witness') grand jury testimony. This was not refreshing the witness' recollection. It was placing before the trial jury testimony previously given before a grand jury when there had

been no cross-examination and defendant was not confronted with the witnesses against him."

In *Westinghouse Electric Corp. v. Wray Equipment Corp.*, 286 F. 2d 491 (C. A. 1), similar use of a prior deposition, where of course the witness had been subject to cross-examination, was held error, the court saying (p. 493):

> "The cases are clear, however, that a deposition used in an attempt to refresh the witness' recollection is not itself admissible as evidence. * * * When a witness is unable to recall a past transaction, the majority of the cases do not allow a prior statement of the witness concerning that transaction to be introduced as a prior inconsistent statement."

And, after citing Wigmore, § 1043 (*supra*), the court added in a footnote, "Wigmore states that the basis of this exclusion is the possibility of improper testimonial effect being given to the prior statement. The instant case presents a forceful example of this danger" (286 F. 2d at 493, footnote 2).

Indeed, the case at bar shows an *a fortiori* situation. As Wigmore noted (§ 1043 at p. 737), there may well be situations where the witness' presently asserted lack of memory would be contradicted in fact by prior recent testimony showing an acute memory a little earlier. But when, as here, the witness invokes privilege, there is nothing whatever to be contradicted; the witness' invocation of his privilege does not contradict any testimony he gave earlier.

It is true that the court here admonished the jury that the subject matter of the questions, which set forth the witness' grand jury answers, were not to be taken as evidence against the defendants (1662a, 1665a). But that is a distinction too delicate for lay jurors. In the words of Mr. Justice Cardozo, speaking for the Court in *Shepard v. United States*, 290 U. S. 96, 104:

> "Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds."

For, as has already been indicated, in this close case, where the jury deliberated for almost four days and yet found petitioner guilty on only one out of 33 counts, it was especially prejudicial that Harris' grand jury testimony should be improperly read to the triers of fact by the prosecutor. *Namet v. United States,* 373 U. S. 179, 187; *Douglas v. Alabama,* 380 U. S. 415.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia, Pa. 19107,
Counsel for the Petitioner.

JAMES L. COBB, JR.,
Coppin Building,
Covington, Kentucky 41011,
Of Counsel.

September 1965.

APPENDIX A.

Constitutional Provisions and Statutes Involved.

The Fifth Amendment provides in pertinent part:

> * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *

18 U. S. C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * *

Section 7201 of the Internal Revenue Code of 1954, 26 U. S. C. 7201, provides in pertinent part:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony * * *

Section 7201 of the Internal Revenue Code of 1954, 26 U. S. C. 7206, provides in pertinent part:

> Any person who—

(1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) *Aid or assistance.*—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;

* * *

shall be guilty of a felony * * *

Section 4401 of the Internal Revenue Code of 1954, 26 U. S. C. 4401, provides in pertinent part:

* * *

(c) Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him. (As amended Sept. 2, 1958, Pub. L. 85-859, Title I, § 151(a), 72 Stat. 1304.)

APPENDIX B.

Opinion Below.

No. 15623

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* FRANK J. ANDREWS, WALTER OWENS, PETER A. ANDREWS, JR., WILLARD WHITLEY, GUS POSTELL, LOUIS TYE, FRANK D. ANDRIOLA, RUSSELL A. MALONE, *Defendants-Appellants.*	APPEALS from the United States District Court for the Eastern District of Kentucky at Covington.

Decided June 17, 1965.

Before: MILLER, CECIL and EDWARDS, *Circuit Judges.*

EDWARDS, *Circuit Judge.* These appeals are from convictions for conspiracy to violate, and specific violations of the Internal Revenue Statutes by fraudulently concealing and withholding gambling excise taxes.

The first count of the indictments was a conspiracy count and the balance of the counts, 2 through 32, consist of the substantive counts of willful understatement of or failure to pay the excise taxes. Count 33 charged violation of the Federal Communications Act, and Counts 34 and 35 charged willful failure to register and pay the wagering occupational tax.

Defendant Frank J. Andrews was found guilty on Count 1 and received a sentence of five years and $10,000 fine. Defendant Daniel Andrews was severed because of his illness. The other seven defendants were found guilty on Count 1 and on a variety of the substantive counts. They were sentenced to terms of five years on each count for which they were convicted, except that Peter A. Andrews and Russell A. Malone were sentenced to only one year for their convictions on Counts 34 and 35. All seven were also fined $10,000 for conviction on Count 1. All of the sentences were made to run concurrently.

This trial was a sequel to large-scale,[1] illegal but wide open gambling operations in Newport, Kentucky. This record clearly establishes the nature and extent of the gambling. Indeed, no defendant, other than Frank Andrews, takes the trouble to deny being in the "business" of gambling during the time concerned. All do deny conspiring to evade federal wagering taxes and the substantive offenses charged.

Each of the several briefs filed on behalf of defendants argues the insufficiency of the evidence to support the verdicts and in this regard relies upon the applicable law as set forth in *Ingram v. United States,* 360 U. S. 672 (1959). In that case the United States Supreme Court affirmed convictions as to defendants Ingram and Jenkins (described as "entrepreneurs") and reversed as to defendants Smith and Law (described as "relatively minor clerical functionaries").

The Court's distinctions as set forth in the majority opinion of Mr. Justice Stewart thus:

> "But the evidence of agreement between Ingram and Jenkins to operate this gambling enterprise, which operation made them liable for federal taxes, and to conceal its operation and its income is clear on this

1. Computations of government evidence indicate total wagers during the times concerned of over five million dollars and a total tax evasion of over four hundred thousand dollars.

record, and is virtually conceded by the petitioners. The evidence was sufficient to support a conclusion that they were engaged not only in a conspiracy to operate and conceal their gambling enterprise, but that they were also parties to an agreement to attempt to defeat or evade the federal taxes imposed upon the operators of such a business.

"As to Smith and Law, the case is quite a different one. While the record clearly supports a finding that Smith and Law were participants in a conspiracy to operate a lottery and to conceal that operation from local law enforcement agencies, we find no warrant for a finding that they were, like Ingram and Jenkins, parties to a conspiracy with a purpose illegal under federal law. Certainly there is nothing in the record to show that Smith and Law knew that Ingram and Jenkins had not paid the taxes, a fact obviously within the knowledge of the latter. . . ." *Ingram v. United States, supra* at 677.

Thus, we take it, convictions for conspiracy to evade federal gambling tax laws cannot be sustained absent proof 1) that defendants were parties to an agreement to defeat or evade the taxes, or 2) that defendants had knowledge that the taxes were due and were not being paid, plus conduct in furtherance of a plan to evade them.

We regard this record as establishing beyond all peradventure of a doubt at least two substantial, deliberate and interrelated schemes for large-scale federal tax evasion. The first such scheme relates to a method for reporting approximately one-quarter of the taxes actually due on the "day" numbers game and other related gambling activities. As testified to by Ruth Jane Siuda, one of the six girls who "ran the work" on the "day" numbers, it was her job after the totalling of the work and after the hits had been determined to "pull the work." Her testimony leaves no doubt that this meant extracting the most convenient one-quarter

of the bet slips so as to show a total take of $1,500-$2,000 per day, whereas in fact the daily total on this operation was $8,500. (See Appendix A.) The federal tax returns show clearly that taxes were paid only on the work thus "pulled."

The second major scheme for tax evasion involved the operation of a "night" numbers game. The record clearly establishes that no taxes were paid on this game at all, and it is argued to us that we should read the record as establishing that this game was within the exception to the wagering tax statute. Int. Rev. Code of 1954, § 4421(2)A.

The evidence, however, is overwhelmingly to the contrary, as obviously the jury found. It is patent that many of the persons participating in the "night" numbers operation were not on the premises at the time of the declaration of the winners and that the fact situation here involved large-scale telephone bet procedures, as well as the writing of bets off the premises.

As to Walter Owens, Willard Whitley, Peter Andrews, Jr., and Gus Postell, there can be no doubt about their status as entrepreneurs in relation to one or the other of the two major tax evasion schemes which we have referred to above. The records of the gambling partnerships, the tax return forms, and the testimony of Internal Revenue Supervisor William R. Tabb, and Agent Robert L. Thomas is ample to establish this.

We believe that the testimony of the Revenue Agents, plus Government Exhibit 305 (See Appendix B) is sufficient evidence from which the jury could have found Louis Tye and Frank ("Bud") Andriola guilty on the conspiracy count as entrepreneurs likewise. Furthermore, their was testimony by a government handwriting expert that Exhibit 305 was in the handwriting of defendant Frank J. Andrews. (See Appendix C.)

As to Russell A. Malone, the testimony clearly indicates his role in advertising that no taxes were paid on the "night" numbers game, while at the same time assuring

bettors that they did not in fact have to be present to win. Hence, his conviction on the conspiracy count seems warranted by the evidence herein. We regard it as consistent with the second of the two evidentiary standards set forth by Justice Stewart in the *Ingram* case.

As to defendant Frank J. Andrews, the evidentiary situation relating to Count 1 is quite different. He was admittedly owner of "The Sportsman's Club" wherein these wide open gambling operations were conducted. It is his contention that his relationship to the club was entirely that of owner of the building and the landlord of those defendants who rented the premises. There is, however, strong circumstantial evidence that defendant Frank J. Andrews was more than a landlord. The unconcealed nature of the gambling operations conducted at his Sportsman's Club, his presence on the first day of the "consolidated operation" of the numbers business, his ordering the installation of the burglar alarm system at the new Sportsman's Club, his visits to the bookkeeping room where the girls "ran the work," the testimony which indicates that it was he who dealt with the competitive threat of Junior Andrews' location, the fact that he hired one of the telephone operators for the "night" numbers game, and the fact that substantial sums were paid out of the "day" numbers proceeds for taxes or rental owed by defendant Frank J. Andrews personally all represent facts from which this jury could have inferred that defendant Frank Andrews had an entrepreneurial relationship to the gambling operation at the Sportsman's Club and knowledge of the two schemes for tax evasion which we have previously described.

Perhaps the most significant bit of evidence pertaining to Frank Andrews' knowledge and participation in the "day" numbers tax evasion scheme is the testimony which clearly establishes that Frank Andrews paid for construction of a hidden closet at the Sportsman's Club. This closet, controlled by an electrical attachment which "could be

opened by touching two nails," was discovered at the time of the August 1961 raid. It contained the "pulled" and "bundled" work for July 1961. Testimony indicated that such "bundles" amounted to less than one-fourth of the total wagers. But the total of the "bundled" work found in the secret closet corresponded exactly with the amount of wagers reported for tax purposes for the month of July 1961.

In addition, testimony showed deposits of $103,000 in defendant Frank Andrews' bank account between October of 1960 and August of 1961. Many of these deposits to Andrews' account were made by an agent of the "day" numbers gambling partnership and over 100 of the checks deposited had symbols on them which were identified as the symbols of various numbers writers.

In short, we believe that the evidence of a substantial conspiracy to evade and defeat the payment of federal wagering taxes was overwhelming and that there was ample evidence to support the jury findings of guilty as to the conspiracy count of the indictment as to all of the defendants in this case within the rule of *Ingram v. United States, supra.*

As to the substantive counts, we do not contemplate such detail. Again, the proofs of willful evasion of taxes offered by the government to support the various counts was overwhelming and uncontroverted.

The meticulous care with which the jury dealt with the individual indictments in this trial is demonstrated by the highly specific verdicts which were returned:

> "We the jury find the defendants as named.
>
> "Frank J. Andrews Guilty on Count 1—undecided on counts 2 thru 33.
>
> "Walter Owens guilty on counts 1 thru 33.
>
> "Peter A. Andrews, Jr., guilty on counts 1 thru 29 and 33-34-35.
>
> "Willard Whitley guilty on counts 1 thru 33.

"Gus Postell guilty on counts 1 thru 15 and 33. Not guilty on 16 thru 32.

"Louis Tye guilty on counts 1 thru 33.

"Frank Andriola guilty on counts 1 thru 9 and 33.

"Russell Malone guilty on counts 1 and 34, 35.

"MELVIN HART, Foreman."

We have read the record and believe that there is ample proof to support the verdicts just recited.

The other important issue argued in this case pertains to the complaint, particularly by defendant Frank Andrews that pretrial and during trial publicity deprived him of due process of law and a fair and impartial jury trial.

This court has dealt recently and extensively with due process violation claims asserted to have been caused by press media prior to and during a criminal trial. *Sheppard v. Maxwell,* — F. 2d — (C. A. 6, 1965). Decided May 5, 1965.

It is certain that defendant's claim as to publicity do not begin to approach in quantity or possible prejudicial impact those asserted and rejected by the majority opinion in *Sheppard.*

As to the standards set in the dissenting opinion, the distinctions between the publicity impact upon this trial as compared to the Sheppard trial are numerous and important.

This was not a capital case.

There is no indication of public shock in this community over the crime of federal tax evasion being charged. This community had indeed been quite tolerant of defendant's "business."

It should particularly be noted in this regard that defendants never moved for a change of venue.

The trial judge was not a candidate for an immediately forthcoming judicial election; and certainly no one could say from this record that the press was ever allowed to

become "the dominant factor" in Judge Swinford's courtroom.

The admonitions to the jury not to read the newspapers or listen to radio or TV were in unmistakable language and repeated at every adjournment. See *Coppedge v. United States,* 272 F. 2d 504 (C. A. D. C., 1959); *Estes v. United States,* 335 F. 2d 609 (C. A. 5, 1964), *cert. denied,* 379 U. S. 964 (1965).

The press comment on the trial, although frequently played on page one, was generally concerned with reporting what went into the trial record. The variances which were called to our attention do not in our judgment represent the "deliberate and highly prejudicial supplementation of the trial record" which was referred to in the dissenting opinion in Sheppard. See *Sheppard v. Maxwell, supra at —.*

This record does not disclose extrajudicial contacts with and communications to this jury.

Finally, we have every reason to believe that the jury verdict in this trial was a "verdict . . . based upon the evidence developed at the trial." *Turner v. Louisiana,* 379 U. S. 466, 472 (1965).

While appellants rely upon *Briggs v. United States,* 221 F. 2d 636 (C. A. 6, 1955); *Marson v. United States,* 203 F. 2d 904 (C. A. 6, 1953), and *Stone v. United States,* 113 F. 2d 70 (C. A. 6, 1940), we find the factual distinctions between this case and those relied on to be both significant and determinative. The facts in this case pertaining to claimed prejudicial publicity are directly comparable to those in *Estes v. United States, supra.*

We also believe that the trial judge committed no error in denying the motion to suppress the evidence seized in this case. Rule 41 of the Federal Rules of Criminal Procedure recites in part:

> "The warrant shall be directed to a civil officer of thes United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized

by the President of the United States. . . ." Rule 41(c) Fed. R. Crim. P.

We have no doubt that the Internal Revenue Agents who served these warants were properly designated under the terms of this rule. *United States v. Sigal,* 341 F. 2d 837 (C. A. 3, 1965); *United States v. Pasha,* 332 F. 2d 193 (C. A. 7, 1964), *Cert. denied,* — U. S. — (1965).

Further, we find no prejudicial error in Judge Swinword's charge when its language is taken as a whole and construed in context.

In this otherwise appropriate charge, however, the trial judge used two sentences which concern us. Referring to reasonable doubt he said: "It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror." We do not believe that this language is desirable. While it may be argued that this simply tells the jury that it is not any captious doubt which should cause them to withhold a verdict if otherwise convinced, it seems to us to place the Court in the position of urging a verdict with more emphasis than is appropriate.

These words also, however, must be viewed in relation to the totality of the Judge's charge on reasonable doubt. (See Appendix D.) Taken as a whole we believe that defendants suffered no prejudice therefrom.

In this regard and in relation to the numerous other issues presented by appellants which we have reviewed, we find no reversible error. Rule 52(a) Fed. R. Crim. P.; 28 U. S. C. § 2111.

Affirmed.

APPENDIX A.

(Testimony of plaintiff-appellee's witness Ruth Jane Siuda)

"Q. (By Mr. Lynch) How did that bundle come to be made?

"A. After we ran the work, the overlooks were pulled out of it, this, then I bundled the work.

"Q. Now, by 'bundled the work' what do you mean that you would do?

"A. Pull these books out of it and put a rubberband around it.

"Q. You would pull the books out?

"A. Yes.

"Q. By that you mean you would pull certain work out?

"A. Yes.

"Q. And how would the work ordinarily be placed, the work from which you would pull these books?

"A. It was all in boxes.

"Q. How many boxes for a day's work?

"A. Three.

"Q. Now, after you—observing the, this particular bundle dated 7/28/61, did you make the tape on that?

"A. Yes, I did.

"Q. How would you know which bundles to pull?

"A. Well, it was usually the same work all the time.

"Q. Well, would you have a particular figure or amount that you would pull?

"A. From 18 to $2,000.

"Q. And in addition to this work that you would pull in, the $18,000 to $2,000 that is a high figure, is that right? In other words, you would pull out a bundle that 18 would equal an $18 to $2,000 high?

"A. Yes.

"Q. What would be done with the other work?

"A. We would keep it three days and then put it in a box.

"Q. And what would happen to it after you put it in a box?

"A. I don't know what happened to it.

"Q. Well, what would you do with it?

"A. I wouldn't do anything with it, just put the work in the box.

"Q. Would you put the box in a particular place?

"A. Just left it in the office.

"Q. And when you came there the next morning would the box be there?

"A. No.

"Q. And the work that you put in this box after three days, the work that hadn't been pulled and bundled, were those the yellow bet slips?

"A. Yes.

"Q. Were those white sheets of paper the telephone work?

"A. Yes.

"Q. Now, do you know what proportion of the work that you would pull and bundle, what proportion that represented to the entire work for that particular day?

"A. Each day ran differently but I would say about a quarter of it.

* * *

"Q. Well, after you did this bundling operation from the previous day's work, how much work would remain after that?

"A. Oh, three-fourths of it.

"Q. And how many boxes similar to boxes such as are shown in government exhibit 199, would the remaining unbundled work fill?

"A. I don't know that it filled it but there would be two boxes.

* * *

"Q. Now, who would be the people who would go through the work and look for the hits?

"A. Who?

"Q. Who?

"A. All of us did it.

"Q. All of who?

"A. All the girls in the office.

"Q. Anyone else?

"A. We had about three girls, four girls come in.

"Q. Anyone else?

"A. Mr. Whitley, sometime.

"Q. Anyone else?

"A. Mr. Postell, sometimes.

"Q. Anyone else?

"A. No.

"Q. Now, after you went through and got the hits for each of the books, you would pull the tickets, mark them, somebody would compute the amounts of hits, is that correct?

"A. That's right.

* * *

"The Court: What was the total amount of money taken in by the house on the day numbers?

* * *

"The Court: Well, I mean from the time charged in this indictment, I don't think that is too material, but we will put it that way.

"Mr. Lynch: From the time she was in the Old Sportsman's Club Your Honor, that would cover it.

"The Court: From the time you were in the Old Sportsman's Club. Can you give me that? If you can't just say you can't.

"The Witness: I would say roughly about, roughly about $8500.00.

"The Court: Roughly $8500.00?

"The Witness: (Nods)."

APPENDIX B

(Testimony of Sidney William Macauley, Special Agent, Intelligence Division, Internal Revenue Service.)

"Q. (By Mr. Lynch) Now, turning to page 47 of this ledger, can you tell us what the figures are and will you demonstrate it on this machine and where the figures are obtained from?

* * *

"A. (Continuing) This page 47 in the journal is dated July 2nd. The expense column—your income column. This is the expense column. This is the difference. Now, let's look at these figures here. Remember I went back a few pages, I went back five pages and the figure was $885 and some cents. The next page, the difference between expenses and income was $409 and then I read aloud the postings from the other pages, $1269, $1222, and this figure $2415.68 is shown here as $2415. If you were to add these five weeks figures, you would arrive at $6300. If you take 50% of it, divide it in half, half of $6300 is $3150. There is a small word here, which I don't know if you can read it, but it says 'house.' We have '10% Bud,' 10% of $3150 is $315, shown here. You subtract $3150 and $315 from $6300, you arrive at $2835, and it is marked over here, 'Junior and Louis.'

"If you divide the remainder, 2835, in half, you get $1417.50, Louis; $1417.50, Junior. . . ."

GOVERNMENT EXHIBIT No. 305

47

		July 2		2415.68
Jr. and Tye	300.00	Bar		1784.15
Band	700.00	Craps		1005.00
Buddy	75.00	Ex Craps		490.00
Duck	30.00	Door		481.50
Andrews	41.00	Booker		33.75
Perry	21.00	Beat Dealers		33.20
Tom	50.00	Nigh Roll		968.00
Pitt	50.00			4795.60
Ex Porter	25.00			
Lot man	20.00			
C. Johnson	25.00			
Worthy	15.00	2415.00		
D. Henny	130.00	1222.00		
RLD	54.00	1269.00		
Whisky	344.77	509.00		
Bar	307.25	885.00		
Coca Cola	26.40			
W. T. Wagner	9.10	6300.00		
New Way	31.51	3150.00	House	
10% Tax	109.49	315.00	10% Bud	
Fruit Products	15.40	2835.00	Jr. Lewis	
		1417.50	Lewis	
	2379.92	1417.50	Jr.	

APPENDIX C.

(Testimony of plaintiff-appellee's witness Edwin C. Schroeder)

"Q. (By Mr. Lynch) Showing you Government Exhibit 305, which is a ledger, referring you to page 47, of that ledger, and specifically to that portion of the page which has a series of figures on the righthand side with notations, '315 house, 315 10% Bud, Junior, Louis, Louis and Junior,' have you seen and made an examination of that?

"A. Yes.

"Q. Now, have you arrived at an opinion as to whether Government Exhibit 314, the slip with the 'Frank J. Andrews, O.K.', Government Exhibit 210-A the spiral notebook, the first page of the spiral notebook; and Government Exhibit 305, page 47 and the listings, the figures, the notations thereon, were written by the same person who wrote the signature cards which are Government Exhibit 237, signed by Frank J. Andrews, the American District Telegraph contract, which is Government Exhibit 299, and the checks, forming Government Exhibit 301?

"A. I have an opinion.

"Q. What is that opinion?

"A. It is my opinion that the writer of the various standard documents signed Frank J. Andrews is the author of the notations in the ledger, the lower right half, and the small slip of paper and the notations in the spiral notebook."

APPENDIX D.

"In the first place, these defendants, and each of them, are presumed to be innocent until their guilt is established to your satisfaction to the exclusion of a reasonable doubt. That presumption of innocence starts with them at the beginning of the case and remains with them throughout the trial, and must be overcome by evidence, before you can accept as evidence as establishing their guilt. You must start with the presumption that these defendants,

and each of them, are innocent until their guilt is established to your satisfaction, as I say, to the exclusion of a reasonable doubt.

"The term reasonable doubt, as used in this instruction, is best defined by a use of the term itself. Don't be confused by reasonable doubt. It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror. It is very easy for a person in his own mind to say, "Well, true, I have a reasonable doubt." Well, that is a rather variable thing, what is reasonable and what is unreasonable. But I think as common sense men of everyday affairs, you do understand the difference between what is reasonable and what is unreasonable, and so this term reasonable doubt means just what it says. It is a doubt based upon reason, not some inconsequential doubt that might flit through the mind of a juror, not some slight mental hesitation that might guide you in determining the less significant affairs of everyday life; but a doubt for which there is reason, such a doubt as would guide you in determining the course of action in the conduct of your ordinary everyday living; a doubt based upon reason, not some shadowy, inconsequential misgiving.

"Few things are capable of proof to absolute certainty and while it is required of the law that the United States should establish its case to the exclusion of a reasonable doubt, it does not mean that the United States should prove its case beyond all doubt. And if it were so required, it would be practically impossible for the United States to successfully carry out the prosecution of the laws. So that term reasonable doubt is used in the sense which I have undertaken here to define it to you.

"Now, your verdict must be unanimous. You are not to arrive at a verdict by casting lots, by holding a primary election, by drawing straws, but your verdict must be unanimous. It must be the verdict of each juror. Each juror must make up his mind what the verdict should be. . . ."

APPENDIX C.

Judgment.

Filed
June 17, 1965
Carl W. Reuss, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

No. 15,623.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK J. ANDREWS, ET AL.,
Defendants-Appellants.

Before: MILLER, CECIL and EDWARDS, *Circuit Judges.*

JUDGMENT.

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX D.

Order Sur Petition for Rehearing.

Filed
August 30, 1965
Carl W. Reuss, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

No. 15,623.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK J. ANDREWS, ET AL.,
Defendants-Appellants.

ORDER.

Before: MILLER, CECIL and EDWARDS, *Circuit Judges.*

Petitions for rehearing having been received and considered by the court in the above-styled appeal,

IT IS HEREBY ORDERED that said petitions be DENIED.

Entered by order of the court:

/s/ CARL W. REUSS,
Clerk.

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In the

Supreme Court of the United States

October Term, 1965

No. 607

GUS POSTELL and WILLARD WHITLEY,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Gus Postell and Willard Whitley, your petitioners, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled cause on June 17, 1965.

OPINION BELOW

The opinion of the Court below (Appendix A, *infra,* 1-18 is reported at 347 F.2d 207.

JURISDICTION

The judgment of the Court below, (Appendix B, *infra,* 19), was entered on June 17, 1965. A timely petition for rehearing was denied on August 30, 1965 (Appendix C, *infra,* 20). A stay of mandate was granted, and by order

of Mr. Justice Potter Stewart, the time for filing this petition for a writ of certiorari was extended to and including October 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

PREFACE

The questions presented in the petition for a writ of certiorari heretofore filed herein by the petitioner, Frank J. Andrews, are equally germane to the questions presented by these petitioners. These questions are full briefed in the petition and brief filed herein by petitioner, Frank J. Andrews, and these petitioners ask the indulgence of the Court for permission to adopt the questions presented, and the brief in support thereof, filed on behalf of Frank J. Andrews, as a part of their petition and brief. This, the petitioners feel, is appropriate in the interests of brevity, and for the convenience of the Court, as well as of counsel.

1. Should the Motion to Suppress Evidence, seized under the search warrant, have been sustained?
2. Was there a fatal variance between the indictment charging one conspiracy, and the evidence tending to show multiple conspiracies?
3. Were the petitioners denied a fair trial by reason of the failure of the District Court to sustain their Motion for a Severance?
4. Should the Court have sustained the Motion for a Mistrial after permitting the attorney for the United States to read to the witness, James Harris, lengthy answers alleged to have been given by Harris before a Grand Jury?
5. Did the Court err in overruling the motion of the Petitioners, Postell and Whitley, for a Judgment of Acquittal?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and statutes involved are:

Fourth Amendment to the United States Constitution.
Fifth Amendment to the United States Constitution.
Sixth Amendment to the United States Constitution.
United States Code:
Title 28, Section 1254(1).
Title 47, Sections 203(c)(3), 501, 409 L.

STATEMENT

The petitioners, Gus Postell and Willard Whitley, were indicted, along with Frank Andrews, Peter A. Andrews, Jr., Louis Tye, Frank Andriola, and Russell A. Malone, by a Grand Jury for the Eastern District of Kentucky. Count 1 of the indictment charges all of the named defendants with the conspiracy to defraud the Internal Revenue Service of the Treasury Department of the United States of its governmental function in the ascertainment, computation, assessment and collection of taxes, and to wilfully attempt to evade and defeat a large part of excise taxes on wagers due and owing to the United States. The conspiracy is charged to have existed continuously from on or about January 1, 1955 to the date upon which the indictment was returned, to-wit: December 21, 1961. The petitioners, Postell and Whitley, were indicted in Counts 2 through 32, with the substantive offense of engaging in the business of accepting wagers, and conducting a lottery for profit, and wilfully attempting to evade and defeat the excise tax due and owing on wagers accepted. The counts of the indictment, 2 through 32, charge that for each month, commencing and

including August 1961, a separate offense was committed, said offenses being charged monthly in the indictment in reverse chronology to February 1959.

Count 33 charges that all defendants, except Russell A. Malone, did unlawfully, wilfully and knowingly cause the Cincinnati and Suburban Bell Telephone Company and the Citizens Telephone Company to furnish telephone facilities at 335 Central Avenue, Newport, Kentucky, which were used for an unlawful purpose, thereby causing a violation of the effective tariff filed by the American Telephone and Telegraph Company with the Federal Communications Commission, the said tariff having been concurred in by the Cincinnati and Suburban Bell Telephone Company and the Citizens Telephone Company. The sections charged to have been violated in this count are 47 U.S.C. Section 203(c)(2) and 501.

The petitioner, Gus Postell, was found guilty on Counts 1 through 15, and Count 33. He was found not guilty on Counts 16 through 32. The petitioner, Willard Whitley, was found guilty on Counts 1 through 33 (2374a).[1]

Upon this verdict, the petitioner, Gus Postell, was sentenced to 5 years imprisonment and a fine of $10,000 on Count 1, and to stand committed for the payment of the fine, on Counts 2 through 15, sentenced to 5 years imprisonment, and on Count 33, one year imprisonment, all sentences to run concurrently. (2382a).

The petitioner, Willard Whitley, was sentenced to 5 years imprisonment and a $10,000 fine on Count 1, to stand committed for payment of the fine. He was sentenced to 5 years on Counts 2 through 32, both inclusive, and to one year on Count 33, all imprisonment sentences to be served concurrently (2381a).

[1] The letter "a" refers to the Appendix filed below, copies of which have been filed with the Clerk of this Court.

ARGUMENT

1. SHOULD THE MOTION TO SUPPRESS EVIDENCE, SEIZED UNDER THE SEARCH WARRANT, HAVE BEEN SUSTAINED BY THE DISTRICT COURT?

A motion was timely made to suppress the evidence seized under the search warrant and the motion may be found at 2322a, et seq.

The validity of the search warrant was questioned, on five grounds, and the action of the District Court in overruling the motion to suppress evidence seized under the warrant was an assigned error. The opinion of this Court held that this was no error. The only facet of the question considered in the opinion is whether the warrant was directed to a proper officer. That was only one point. There remained the question, unanswered by the opinion, of whether the facts stated in the affidavit were sufficient to constitute probable cause for the issuance of the warrant. The evidence is uncontradicted, that at the time of the issuance of the warrant, there were wagering stamps issued to persons on each of the premises. This being true, it would have been impossible for anyone to say that there was a violation of the wagering tax laws until the following month, when tax returns, showing accepted wagers, were required to be filed.

We think our contention of a lack of probable cause is of significant importance in the matter and this ground was not considered by the Circuit Court of Appeals.

Under Subdivision C of Rule 41 F.R. Cr. P., providing that search warrants shall issue only on affidavits sworn to before the Judge or Commissioner, the Commissioner must look solely to the affidavit and determine if facts disclosed

thereby constitute probable cause for issuance at the time of issuance. *U.S.* v. *Nichols,* 89 F. Sup. 953.

We have stated heretofore that the Affidavit is silent as to any description or identification of a wager by the affiant. In a matter of the nature of this case, the only property subject to seizure is that "designed or intended for use or which has been used as a means of committing a criminal offense". Rule 41 (a) (2) F.R.Cr. P. It should be apparent that no records required by law to be kept, or which were in fact kept, in furtherance of the business not prohibited by federal law should be seized.

Probable cause for the issuance of a search warrant necessarily implies not simply that there are reasonable grounds to believe that some violation of law exists, but that there is a violation in respect to some property located on some premises or on some person, each of which can be unmistakably identified so as to be capable of being particularly described in search warrant from the information in the affidavit. *Lowrey* v. *U.S.* 161 F. 2d 30. Cert. Den. 67 S.Ct. 1737, 331 U.S. 849, 91 L. Ed. 1858.

The finding of probable cause for the issuance of a search warrant is not for the affiant or deponent seeking the issuance of same, and no search warrant should be issued unless the Judge to whom application has been made has been furnished with facts, under oath, designed to show probable cause. *Veeder* v. *U.S.* 252 F. 414, Cert. Den. 38 S.Ct. 428, 246 U.S. 675, 62 L. Ed. 933.

It must be obvious that it is an absolute impossibility to determine that persons having a wagering registration stamp are, or are not, attempting to evade the excise tax until after the monthly report is filed by such person. No matter how his business was conducted, if, at the proper time, he made a report and paid the tax due, there could have been no violation.

What has actually resulted in this case, is that the search warrants were issued without probable cause, and the violations charged in the indictment, if substantiated by the evidence seized on the search, were learned by the officers after the search.

The affidavits were the sole evidence before the Commissioner. A finding of probable cause must be based upon the affidavit and cannot be helped by what is found in the search, or by subsequent testimony introduced to bolster the affidavit. *Baysden* v. *United States,* 271 F.2d 325.

2. WAS THERE A FATAL VARIANCE BETWEEN THE INDICTMENT, CHARGING ONE CONSPIRACY, AND THE EVIDENCE, TENDING TO SHOW MULTIPLE CONSPIRACIES?

The petitioners have contended throughout that there was a fatal variance between the allegations of Count 1 of the indictment, charging one general conspiracy, and the evidence, as it was introduced. If the evidence shows a conspiracy at all to violate the laws of the United States, the conclusion is inescapable that not only did the evidence show a multiplicity of conspiracies, but it was actually the theory of the prosecuting officers of the United States. The government established that there were at least three separate and distinct numbers operations conducted by different groups at the large night club premise. The Circuit Court gave no consideration to this contention, but did find:

> "We regard this record as establishing, beyond a peradventure of doubt, at least two substantial, deliberate and interrelated schemes for large-scale federal tax evasion." (Appendix A, *infra,* 3).

With that statement, the Court then disregards consideration of the error claimed.

The evidence shows that for part of the time covered by the indictment, there was a wagering tax stamp taken by Willard Whitley and Gus Postell, a partnership, located originally on West Southgate Street, but afterwards the address changed to 339 Central. This partnership regularly filed their monthly form 730 returns, showing no wagers accepted by it, and these returns were accepted without question by the Internal Revenue Service for many months.

The variance complained of here is, of course, of no moment unless the substantial rights of the petitioners have been prejudiced. *Berger* v. *U. S.* 55 S.Ct. 629, 295 U. S. 78, 79 L. Ed. 1314. *Grissette* v. *U. S.* 313 F. 2d 187. The prejudicial effect on the rights of all of the defendants can hardly be denied. For years, according to the evidence, the Internal Revenue Service has known of the various enterprises of the petitioners and the others holding stamps on the premises but not indicted.

3. WERE THE PETITIONERS DENIED A FAIR TRIAL BY REASON OF THE FAILURE OF THE DISTRICT COURT TO SUSTAIN THEIR MOTION FOR A SEVERANCE?

The Court may order a severance of either defendants, or of counts, in an indictment or whatever other relief justice requires. Rule 14, F.R.Cr.P.

The petitioner, Gus Postell, was shown to have registered under the wagering tax act as a partner of Willard Whitley. The partnership agreement between Willard Whitley, Walter Owens and Daniel Andrews (Government's Exhibit 127, 2424a), provides:

> "That the interest of Whitley is restricted wholly and solely to the day numbers business being conducted in and upon said premises, and that he has no right, title or interest in any other business or businesses conducted in and upon the premises."

It is not shown by the evidence that the partnership of Whitley and Postell ever accepted a wager of any kind or character, but, on the contrary, they filed their regular monthly reports on form 740C showing "No Wagers Accepted".

Daniel Andrews, a defendant named in the indictment, was severed by reason of illness. This was entirely beyond the control of these petitioners. They were denied the opportunity of having him present to testify, if he so desired, which testimony would have, at least, shown the separate enterprises being conducted on the premises and the total lack of any interest of the petitioner Whitley, or responsibility for anything other than the day numbers.

The necessity for a severance is best shown by a consideration of the position of petitioner, Gus Postell, who, for eighteen days stood trial before a jury which heard repeated statements by various other defendants, not made in his presence, and not binding upon him in any sense. We submit that the oft repeated admonition of the Court that such statements were not to be considered, except as to the person making same, were insufficient to disspell the prejudicial effect from the minds of the jury. Indeed, it is just as likely that the repeated admonitions would place emphasis on the statements.

We suggest that the inference may well be drawn that this prosecution was a well planned effort on the part of the Agents of the United States to convict certain defendants. It followed a pattern of taking a number of independent acts, committed, if at all, by persons other than

these petitioners, and welded them into one indictment. The result was that during this long trial, each of the then defendants were compelled to stand trial jointly with other defendants who were charged with offenses having nothing in common, except the locale of the premises.

We further suggest that Count 33 of the indictment was included for the sole and only purpose of using it as a basis for granting immunity to witnesses under the provisions of Title 47 U.S.C. 409 L, which provides, under the administrative provisions of the Federal Communications Act, that:

> "* * * but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, he is compelled, after having claimed his privilege against self-incrimination, to testify * * *"

The Justice Department has obviously adopted the procedure of including a count in indictments, such as the one involved herein, charging a violation of the Federal Communications Act. It has done so in this case in Count 33. This means the Agents of the United States can select whomever they desire to prosecute and whomever they desire to immunize from prosecution. We urge that it borders on the ridiculous to say that these petitioners, who had no telephone service subscribed to by them, or under their control on the premise, could be guilty of causing the telephone company to violate a tariff regulation.

Mr. Donavan Derricks testified (1544a et seq.), that none of the defendants either subscribed for or were listed for any of the telephones on the premises. As to the proposition that they caused the telephone company to violate their tariff by installing these telephones, we think that is completely answered by a simple question, i.e., Why did the

telephone company install twenty telephones in various parts of one nightclub without inquiry and supervision as to their use? That is especially true in view of the fact that the various listings given by the telephone company for these telephones included a construction company, a booking agency, a roofing company and several others. The only persons in our judgment who would take this count seriously would be an attorney for the United States who used the wire and communications chapter of the Federal Statutes for the purpose of granting immunity to witnesses at a Grand Jury hearing.

This testimony could not have been introduced at a trial of these petitioners severed from other defendants for the simple reason that they had never subscribed to a telephone on the premises involved.

The prejudicial effect of the failure to grant a severance will more fully appear in subsequent questions presented in this petition.

4. SHOULD THE COURT HAVE SUSTAINED THE MOTION FOR A MISTRIAL AFTER PERMITTING THE ATTORNEY FOR THE UNITED STATES TO READ TO THE WITNESS, JAMES HARRIS, LENGTHY ANSWERS ALLEGED TO HAVE BEEN GIVEN BY HARRIS BEFORE A GRAND JURY?

The witness, James Harris, was called by the United States to testify, and after some preliminary questions, he then asserted his privilege under the Fifth Amendment on the ground of self-incrimination.

It is essential to quote, in part, what occurred (1653a to 1659a).

THE COURT: Overruled.

Q. Mr. Harris, in the course of this conversation with Mr. Andrews, was there a reference to him about the numbers business at the Copa Club?

A. Never at no time.

Q. Mr. Harris, do you recall testifying before the Grand Jury of this court?

A. That's right.

Q. Do you recall being sworn and testifying about these matters that I have questioned you about here today?

A. That's right.

Q. Do you recall stating at that time —

MR. DAVIES: We object, if the Court please.

THE COURT: Overruled.

MR. COBB: We object.

THE COURT: What are the grounds of your objection?

MR. COBB: He is giving the answers to the questions. There is no hostility.

MR. WEINTRAUB: We should be shown the minutes.

THE COURT: Approach the bench, please, gentlemen.

(Reporter's note:) the following occurred at the bench in the immediate presence of counsel and the Court, and in the presence but out of hearing of the jury:

THE COURT: I am going to permit him — this witness is on the stand and obviously according to the statements of the United States Attorney contradictory statements at a former hearing have been made, and I am going to permit them to cross-examine him, I am going to permit him to ask leading questions; I am going to permit him to treat him as a hostile witness, or as a witness that was offered by the other side. That is the law that has been established by numerous decisions of the Supreme Court of the United States, and irrespective of that it is the law in this case, and I am going to—and is going to continue to be the law in

this case as long as this case is on trial. Let's don't have to go through this every single time we offer a witness.

MR. DAVIES: It isn't a question of going through it.

THE COURT: Sir?

MR. DAVIES: It isn't so much a question of going through this, but they have had this witness and they know what his testimony is and that's exactly the point.

MR. GOLDFARB: That's exactly the point, Your Honor.

THE COURT: That is the point he has not testified to like he told them he would. That is the whole point. I am going to permit them to cross-examine him, I will permit you to do the same thing when you offer your witnesses.

MR. COBB: We don't know about his testimony.

THE COURT: Of course you don't, I don't either.

MR. WEINTRAUB: If Your Honor please, my last objection was not as to what Your Honor thinks. My last objection I was going to make was that Your Honor direct them to furnish us now a copy of the minutes of the Grand Jury.

THE COURT: I overrule your motion. That is the whole point.

MR. WEINTRAUB: Then, if Your Honor please, if they read something from him how do we know—and I am not making this charge against the Government.

THE COURT: I overrule your motion that—you didn't say anything about that, that was your objection?

MR. WEINTRAUB: I was just starting when Your Honor said come up to the bench.

THE COURT: I overrule your motion.

WHEREUPON THE COLLOQUY AT THE BENCH ENDED.

THE COURT: Wait, one of the defendants is out of the courtroom. All right, there he is, go ahead.

Q. Now, do you recall testifying on Dec. 20, 1961, before the United States District Court for the Eastern District of Kentucky, Grand Jury?

A. Yes, sir, I remember that.

Q. Do you recall being asked the question at that time: "Give us the details on that conversation." and answering, "He said the reason I have called you is because I have had so much truble with the Copa Club not making any money, I have remodeled the place, spent a lot of money, and over the years it seemed to go into the red, and it can't get out of the red, and so he said, talking to different ones and knowing you, Jim, I think you could bring it out of the red. I have a lot of money stuck in the place, I don't need the Copa Club, I got the numbers going for me, but I got this place and it has been a playground for the colored people for many years, I don't want to close the club up, I want to keep the colored trade here, so I would like for you to make money. So we discussed the thing, he said there was no numbers involved, so all I want you to do is book the shows and operate the club and so forth, so our discussion was I didn't think it was possible."

MR. DAVIES: Now, if the Court please, the defendants that I represent move the court to set aside the swearing of the jury and declare a mistrial because of the contents of the attorney of the United States in reading in full a question, with the obvious prejudicial import that this question has.

MR. GOLDFARB: This is an answer.

MR. DAVIES: Wait until I finish, Mr. Goldfarb. When the only possible things that he would have been permitted to ask under the law was some question which would contradict this statement, and a bare statement that the witness made, that there was no mention made of numbers. Now that — there was only two or three words answer, and Mr. Goldfarb has

read a highly prejudicial question—prejudicial to every one of these defendants.

MR. WEINTRAUB: The defendants that I represent join in that motion, Your Honor.

THE COURT: Overruled.

Q. Do you remember making that answer to the question I read to you?

A. Well, you have asked me a lot, you read quite a bit there.

Q. Well, do you want me to go over it slowly and you can answer each sentence—each question?

Do you remember saying first—and this is in reference to your conversation with Mr. Andrews—

THE COURT: Let him take the record—do you have it there?

MR. GOLDFARB: Yes, sir.

THE COURT: Let him look at it and read it and see whether or not he made those statements.

Q. Showing you—

MR. WEINTRAUB: If Your Honor please, may I request the Court to make a motion that the defense be furnished—I don't know whether they have got it in the record when we were there before, that the defense be furnished with a copy of the minutes of the testimony of Mr. Harris before the Grand Jury because, for several reasons, first, it is impossible for the defense to know—I make no charge or accusation against the government.

THE COURT: Now approach the bench here a minute.

(Reporter's note: The following occurred at the bench.)

in the immediate presence of counsel and the Court, and in the presence but out of hearing of the jury:

THE COURT: Now what is the basis of your motion. What right have I got to require the United States to produce its records?

MR. WEINTRAUB: Well, if Your Honor please, for the simple reason how do we know—

THE COURT: Wait a minute. Don't argue the point you are making a speech before the jury and doing the same thing you are accusing the United States attorney of doing, making it appear that the United States is trying to conceal something from you. There is no law that I know of that permits the court to require them to do it. What is it?

MR. WEINTRAUB: Then, if Your Honor please, I would just like to say this, maybe it is a matter that law would have to be established, but I want to give you my reason. My reason is, number one, we have no reason if government counsel is misreading a question and answer. We have no way of knowing whether it is being taken out of context.

and continuing on page 1662a of the Appendix:

Q. Now, Mr. Harris, do you remember my last question to you. Do you want me to repeat it to you?

A. You can repeat it.

Q. Do you recall testifying before the Grand Jury on the date I have stated, and answering to this question "Give us the details of that conversation," the following answer: "He said the reason I have called you is because I have had so much trouble with the Copa Club, not making any money. I have remodeled the place, spent a lot of money and over the years it seemed to go into the red, and I can't get it out of the red, and so he said, talking to different ones and knowing, you, Jim, I think you could bring it out of the red. I have a lot of money stuck in the place, I don't need the Copa Club. I got the numbers going for me, but I got this place and it has been a playground for colored people for many years; I don't want to close the club up, I want to keep the colored trade here, so I would like for you to make money. So we discussed the thing, he said there was no numbers involved, all I want you to do is book the shows and operate the club and so forth, and so our discussion was I didn't think it was possible."

Do you remember being asked that question and making that answer?

A. I would like to refuse to answer that question on the grounds that I might be incriminated.

* * *

Q. Do you remember testifying before the grand jury being asked this question — "This was Frank Andrews saying this?" — Answer: "Yes, they came to me and said, why don't you get back in the bottoms where you belong, you've got that colored trade and no one is bothering you, why do you want to come up here in this end, and he also told me, he said, if I would go back to the bottoms they would put together this numbers racket and consolidate it into one racket there was one or two bucking one another, and I said I didn't think it was possible to do it, so he said, I can't do it, and that was the end of it."

MR. DAVIES: We object.

MR. GOLDFARB: Your Honor every question I asked this witness has been based on these questions.

THE COURT: Overrule the objection.

Q. Do you remember being asked that question and making that answer?

A. I refuse to answer that question on the grounds that I might incriminate myself.

MR. DAVIES: Now, if the Court please, I want to renew my motion to set aside the swearing of the jury and declare a mistrial because of the reading of those questions.

THE COURT: Overruled.

MR. COBB: We join in the motion.

MR. WEINTRAUB: We join in the motion.

THE COURT: Overruled.

Members of the jury, you will not consider these questions as I have instructed you, you will not consider these questions as having any bearing upon the guilt or innocence of these accused; or any of them, they are asked solely here for the purpose of

examining this witness, who the court says may be examined under the rules of evidence if he were a hostile witness.

Q. Mr. Harris, I will ask you if you recall being asked the question before the same Grand Jury at the same date: "Did he discuss with you anyone else taking over the Copa Club?" And making this answer: "Yes, I said, yes, I know a man I was just with last week that just lost this job, that is good on booking shows, he has been in the business for years around night clubs, has had many night clubs of his own, which I belive might fit the picture for you, I think I can get him down and I think he can do the job for you. So he asked me who it was and I told him Al Holtzman out of Chicago, so I called Mr. Holtzman and he talked to Mr. Andrews and it was only a matter of a few days until Mr. Holtzman was working, running the club for Mr. Andrews." Do you recall being asked that question and making that answer?

MR. COBB: Objection.

THE COURT: Objection sustained. I don't think that is pertinent, and —

MR. DAVIES: I renew my motion to declare a mistrial, Your Honor.

THE COURT: Overruled.

MR. WEINTRAUB: The defendant Walter Owens and other defendants join in the motion.

THE COURT: Overruled.

MR. COBB: We join in the motion.

* * *

The trial court did, at the request of counsel for the defendants, instruct the jury concerning the evidence, but we feel that did not cure the obvious disastrous results of the questions asked.

What was done by the government attorney in this instance is a matter that goes to the core and heart of the right of a defendant to a fair trial. What was done

was violative of the *Confrontation Clause of the Sixth Amendment*. Not only was it violative as to the rights of Frank J. Andrews; it was in every respect even more vicious and destructive in its effect and application to the other defendants — regardless of the court's admonition to the jury.

Admittedly, the questions asked of Harris were not in the nature of substantive evidence; but the mere asking of the questions had the same effect, notwithstanding the court's instruction not to treat it as such. No admonition, however strong, could wipe out of the jury's mind the effect of these questions. It was well calculated to impress the jury. It did!

The prejudicial effect of similar testimony was recognized in *Douglas* v. *Alabama*, 380 U.S. 415; 13 L.Ed.2d 934, 85 S.Ct. 1074.

In this case, the damage was greater than in the *Douglas* case. In *Douglas* the prosecution at least had the "confession" identified. In this case, counsel for the defendant pleaded with the court to allow counsel to examine the Grand Jury minutes, from which the Government attorney claimed he was reading. (1655a-1661a). While this would not have cured the violation of the constitutional rights of the defendants, it would have at least allowed the defendants, through their counsel, to ascertain whether the questions and answers being read were being properly read, or whether they were being read out of context. The request of the defendants was denied by the trial court.

This issue was not discussed in the opinion of the Court of Appeals, although it was an issue of vital importance. It was an error of substance, so violative of the rights of the petitioners that on this one issue alone the lower courts should have been reversed and a new trial granted.

5. DID THE COURT ERR IN OVERRULING THE MOTION OF THE PETITIONERS, POSTELL AND WHITLEY, FOR A JUDGMENT OF ACQUITTAL?

The petitioner Whitley was an active partner in the "day numbers" operation, with no interest in any of the other operations on the premises. The computation of tax alleged to have been evaded was based very substantially on "night numbers" and other wagering activities. The petitioner, Whitley, monthly prepared a report which was delivered by other partners to the tax accountant for the partnership, and those reports were converted to the monthly return, Form 740C, by the accountant. There is no showing that Whitley ever knew or had information from which an intent to defeat the payment of the wagering tax could be inferred. He was shown by the partnership agreement, supra, to have a 50% interest in the "day numbers" only, and this interest was of the gross receipts of the day numbers, without any expenses (1386a), which, we take it, would include the payment of taxes.

The petitioner, Gus Postell, admittedly applied for, and received, a wagering tax registration stamp as a partner with Willard Whitley, under the partnership name "Whitley & Postell". That partnership, sofar as this record is concerned, never operated. From the time of its inception, the partnership was never shown to have accepted wagers. Gus Postell was never shown to have accepted a wager, even as an agent of any of the other partnerships. Postell was actually on salary at the night club as manager of the bar (1388a). Every month, Form 740C, filed by this partnership, showed "No Wagers Accepted". These monthly returns were never questioned by the Internal Revenue Service, and were accepted by them.

He was not shown to have any interest in any of the operations at the club, except as bar manager. The theory of the government was that he was on the premises on occasion, and on rare occasions, he assisted one of the lady clerks to "look for hits". This activity did not take place until after the lottery was over, and was purely clerical in character.

It is obvious that the conviction of the petitioner Postell is based upon the fact that he possessed a wagering stamp. It is likewise obvious that the jury considered this as an admission by him of some interest in the partnership operating the lottery. This is borne out by the verdict which found this petitioner "Not Guilty" on the substantive count for each month, except those during which he was registered as a partner of Whitley. The conclusion is inescapable that his conviction was based on this inference.

An inference based upon the mere registration and application for an occupational wagering tax stamp clearly violates the *Fifth Amendment to the Constitution of the United States* as compelling petitioner to give evidence against himself. The possession of the occupational stamp cannot be considered as a confession or admission of a past violation of the law. *United States* v. *Kahriger,* 345 U.S. 22, 92 L.Ed. 754, 73 S.Ct. 510.

The effect to be given the possession of the stamp was discussed by the Supreme Court of the State of Florida on several occasions. While not binding upon this Court, the opinions of the Supreme Court of Florida are persuasive by reason of their sound reasoning.

The State of Florida enacted a statute providing in substance that the possession of the Federal Gambling Stamp would be prima facie evidence in prosecutions under

Florida gambling laws. The Supreme Court of Florida declared the Statute unconstitutional and ordered the discharge of one Jefferson, who had been held for Grand Jury action by a committing Magistrate. The case discusses many of the facets presented by this petition, and, we think, will be logically persuasive of our position.

Jefferson v. *Sweat,* 76 So. 2d 394.

In another case, the Florida Supreme Court held that no presumption could be raised by reason of holding a Federal Gambling Stamp in an action to abate a nuisance. The Court went even further and expressed the belief that "to treat payment of the 10% Federal tax on gambling receipts as a confession, would be to render the Statute unconstitutional."

Boynton v. *State,* 75 So. 2d 211.
See also, *McNabb* v. *United States,* 318 U.S. 332; 63 S. Ct. 608; 87 L. Ed. 818, and *Rowe* v. *Florida,* 84 So. 2d 409.

We submit that the decisions of this Court in *Ingram* v. *United States,* 360 U.S. 672, 3 L. Ed. 2d 1503, 17 S. Ct. 1314, and *United States* v. *Calamaro,* 354 U.S. 351, 1 L. Ed. 2d 1394, 77 S. Ct. 1138, are controlling here. The government has completely failed to establish that the petitioner Postell had any interest, duty, knowledge or intent with respect to the offenses charged in the indictment herein, which are all necessary under *Ingram* and *Calamaro, supra.*

CONCLUSION

For the reasons stated, we think it clear that the Writ of Certiorari to the Sixth Circuit Court of Appeals should be granted. These reasons are:

The combination of several offenses into one indictment;

The admission of evidence as to a number of conspiracies, with but one general conspiracy alleged;

The repeated admission of statements made by defendants, other than these petitioners, were highly prejudicial to them, notwithstanding the frequent admonitions of the Court;

The permission by the trial court to the attorneys for the government to read Grand Jury testimony of the witness James Harris, after the witness had claimed a Fifth Amendment privilege;

The failure of the Court to sustain the several motions for a mistrial made at that time;

The conviction of the petitioner, Gus Postell, based upon his having registered as a partner with Willard Whitley;

The failure of the Sixth Circuit Court of Appeals to consider and pass upon many of the errors assigned upon the appeal to that court;

The impossibility of avoiding the prejudicial effect upon these petitioners of the highly prejudicial news and newspaper accounts; and the coercive effect of the instructions of the Court to the jury, both of which are fully discussed in the petition and brief of Frank J. Andrews, filed herein;

all of which are conducive to the belief that this proceeding and the verdict of guilty against these petitioners, violate the right of due process under the Fifth Amendment, and the right to a trial by an impartial jury, under the

Sixth Amendment to the Constitution of the United States.

Respectfully submitted,

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DANIEL W. DAVIES

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THOS. D. HIRSCHFELD

DAVIES & HIRSCHFELD
331 York Street
Newport, Kentucky

Attorneys for Petitioners,
Gus Postell and Willard Whitley.

APPENDIX A.

Opinion Below.

No. 15623

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* FRANK J. ANDREWS, WALTER OWENS, PETER A. ANDREWS, JR., WILLARD WHITLEY, GUS POSTELL, LOUIS TYE, FRANK D. ANDRIOLA, RUSSELL A. MALONE, *Defendants-Appellants.*	APPEALS from the United States District Court for the Eastern District of Kentucky at Covington.

Decided June 17, 1965.

Before: MILLER, CECIL and EDWARDS, Circuit Judges.

EDWARDS, *Circuit Judge.* These appeals are from convictions for conspiracy to violate, and specific violations of the Internal Revenue Statutes by fraudulently concealing and witholding gambling excise taxes.

The first count of the indictments was a conspiracy count and the balance of the counts, 2 through 32, consist of the substantive counts of willful understatement of or failure to pay the excise taxes. Count 33 charged violation of the Federal Communications Act, and Counts 34 and 35 charged willful failure to register and pay the wagering occupational tax.

Defendant Frank J. Andrews was found guilty on Count 1 and received a sentence of five years and $10,000 fine. Defendant Daniel Andrews was severed because of his illness. The other seven defendants were found guilty on Count 1 and on a variety of the substantive counts. They were sentenced to terms of five years on each count for which they were convicted, except that Peter A. Andrews and Russell A. Malone were sentenced to only one year for their convictions on Counts 34 and 35. All seven were also fined $10,000 for conviction on Count 1. All of the sentences were made to run concurrently.

This trial was a sequel to large-scale,[1] illegal but wide open gambling operations in Newport, Kentucky. This record clearly establishes the nature and extent of the gambling. Indeed, no defendant, other than Frank Andrews, takes the trouble to deny being in the "business" of gambling during the time concerned. All do deny conspiring to evade federal wagering taxes and the substantive offenses charged.

Each of the several briefs filed on behalf of defendants argues the insufficiency of the evidence to support the verdicts and in this regard relies upon the applicable law as set forth in *Ingram* v. *United States,* 360 U. S. 672 (1959). In that case the United States Supreme Court affirmed convictions as to defendants Ingram and Jenkins (described as "entrepreneurs") and reversed as to defendants Smith and Law (described as "relatively minor clerical functionaries").

The Court's distinctions as set forth in the majority opinion of Mr. Justice Stewart thus:

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[1] Computations of government evidence indicate total wagers during the times concerned of over five million dollars and a total tax evasion of over four hundred thousand dollars.

"But the evidence of agreement between Ingram and Jenkins to operate this gambling enterprise, which operation made them liable for federal taxes, and to conceal its operation and its income is clear on this record, and is virtually conceded by the petitioners. The evidence was sufficient to support a conclusion that they were engaged not only in a conspiracy to operate and conceal their gambling enterprise, but that they were also parties to an agreement to attempt to defeat or evade the federal taxes imposed upon the operators of such a business.

"As to Smith and Law, the case is quite a different one. While the record clearly supports a finding that Smith and Law were participants in a conspiracy to operate a lottery and to conceal that operation from local law enforcement agencies, we find no warrant for a finding that they were, like Ingram and Jenkins, parties to a conspiracy with a purpose illegal under federal law. Certainly there is nothing in the record to show that Smith and Law knew that Ingram and Jenkins had not paid the taxes, a fact obviously within the knowledge of the latter. . . ." *Ingram* v. *United States, supra* at 677.

Thus, we take it, convictions for conspiracy to evade federal gambling tax laws cannot be sustained absent proof 1) that defendants were parties to an agreement to defeat or evade the taxes, or 2) that defendants had knowledge that the taxes were due and were not being paid, plus conduct in furtherance of a plan to evade them.

We regard this record as establishing beyond all peradventure of a doubt at least two substantial, deliberate and interrelated schemes for large-scale federal tax evasion. The first such scheme relates to a method for reporting approximately one-quarter of the taxes actually due on the "day" numbers game and other related gambling activities. As testified to by Ruth Jane Siuda, one of the six girls who

"ran the work" on the "day" numbers, it was her job after the totalling of the work and after the hits had been determined to "pull the work." Her testimony leaves no doubt that this meant extracting the most convenient one-quarter of the bet slips so as to show a total take of $1,500-$2,000 per day, whereas in fact the daily total on this operation was $8,500. (See Appendix A.) The federal tax returns show clearly that taxes were paid only on the work thus "pulled."

The second major scheme for tax evasion involved the operation of a "night" numbers game. The record clearly establishes that no taxes were paid on this game at all, and it is argued to us that we should read the record as establishing that this game was within the exception to the wagering tax statute. Int. Rev. Code of 1954, § 4421(2)A.

The evidence, however, is overwhelmingly to the contrary, as obviously the jury found. It is patent that many of the persons participating in the "night" numbers operation were not on the premises at the time of the declaration of the winners and that the fact situation here involved large-scale telephone bet procedures, as well as the writing of bets off the premises.

As to Walter Owens, Willard Whitley, Peter Andrews, Jr., and Gus Postell, there can be no doubt about their status as entrepreneurs in relation to one or the other of the two major tax evasion schemes which we have referred to above. The records of the gambling partnerships, the tax return forms, and the testimony of Internal Revenue Supervisor William R. Tabb, and Agent Robert L. Thomas is ample to establish this.

We believe that the testimony of the Revenue Agents, plus Government Exhibit 305 (See Appendix B) is sufficient evidence from which the jury could have found Louis Tye and Frank ("Bud") Andriola guilty on the conspiracy

count as entrepreneurs likewise. Furthermore, their was testimony by a government handwriting expert that Exhibit 305 was in the handwriting of defendant Frank J. Andrews. (See Appendix C.)

As to Russell A. Malone, the testimony clearly indicates his role in advertising that no taxes were paid on the "night" numbers game, while at the same time assuring bettors that they did not in fact have to be present to win. Hence, his conviction on the conspiracy count seems warranted by the evidence herein. We regard it as consistent with the second of the two evidentiary standards set forth by Justice Stewart in the *Ingram* case.

As to Defendant Frank J. Andrews, the evidentiary situation relating to Count 1 is quite different. He was admittedly owner of "The Sportsman's Club" wherein these wide open gambling operations were conducted. It is his contention that his relationship to the club was entirely that of owner of the building and the landlord of those defendants who rented the premises. There is, however, strong circumstantial evidence that defendant Frank J. Andrews was more than a landlord. The unconcealed nature of the gambling operations conducted at his Sportsman's Club, his presence on the first day of the "consolidated operation" of the numbers business, his ordering the installation of the burglar alarm system at the new Sportsman's Club, his visits to the bookkeeping room where the girls "ran the work," the testimony which indicates that it was he who dealt with the competitive threat of Junior Andrews' location, the fact that he hired one of the telephone operators for the "night" numbers game, and the fact that substantial sums were paid out of the "day" numbers proceeds for taxes or rental owed by defendant Frank J. Andrews personally all represent facts from which this jury could have inferred that defendant Frank Andrews

had an entrepreneurial relationship to the gambling operation at the Sportsman's Club and knowledge of the two schemes for tax evasion which we have previously described.

Perhaps the most significant bit of evidence pertaining to Frank Andrews' knowledge and participation in the "day" numbers tax evasion scheme is the testimony which clearly establishes that Frank Andrews paid for construction of a hidden closet at the Sportsman's Club. This closet, controlled by an electrical attachment which "could be opened by touching two nails," was discovered at the time of the August 1961 raid. It contained the "pulled" and "bundled" work for July 1961. Testimony indicated that such "bundles" amounted to less than one-fourth of the total wagers. But the total of the "bundled" work found in the secret closet corresponded exactly with the amount of wagers reported for tax purposes for the month of July 1961.

In addition, testimony showed deposits of $103,000 in defendant Frank Andrews' bank account between October of 1960 and August of 1961. Many of these deposits to Andrews' account were made by an agent of the "day" numbers gambling partnership and over 100 of the checks deposited had symbols on them which were identified as the symbols of various numbers writers.

In short, we believe that the evidence of a substantial conspiracy to evade and defeat the payment of federal wagering taxes was overwhelming and that there was ample evidence to support the jury findings of guilty as to the conspiracy count of the indictment as to all of the defendants in this case within the rule of *Ingram* v. *United States, supra.*

As to the substantive counts, we do not contemplate such detail. Again, the proofs of willful evasion of taxes

offered by the government to support the various counts was overwhelming and uncontroverted.

The meticulous care with which the jury dealt with the individual indictments in this trial is demonstrated by the highly specific verdicts which were returned:

> "We the jury find the defendants as named.
>
> "Frank J. Andrews Guilty on Count 1—undecided on counts 2 thru 33.
>
> "Walter Owens guilty on counts 1 thru 33.
>
> "Peter A. Andrews, Jr., guilty on counts 1 thru 29 and 33-34-35.
>
> "Willard Whitley guilty on counts 1 thru 33.
>
> "Gus Postell guilty on counts 1 thru 15 and 33. Not guilty on 16 thru 32.
>
> "Louis Tye guilty on counts 1 thru 33.
>
> "Frank Andriola guilty on counts 1 thru 9 and 33.
>
> "Russell Malone guilty on counts 1 and 34, 35.
>
> "MELVIN HART, Foreman."

We have read the record and believe that there is ample proof to support the verdicts just recited.

The other important issue argued in this case pertains to the complaint, particularly by defendant Frank Andrews that pretrial and during trial publicity deprived him of due process of law and a fair and impartial jury trial.

This court has dealt recently and extensively with due process violation claims asserted to have been caused by press media prior to and during a criminal trial. *Sheppard* v. *Maxwell*, — F. 2d — (C.A. 6, 1965). Decided May 5, 1965.

It is certain that defendant's claim as to publicity do not begin to approach in quantity or possible prejudicial impact those asserted and rejected by the majority opinion in *Sheppard*.

As to the standards set in the dissenting opinion, the distinctions between the publicity impact upon this trial as compared to the Sheppard trial are numerous and important.

This was not a capital case.

There is no indication of public shock in this community over the crime of federal tax evasion being charged. This community had indeed been quite tolerant of defendant's "business."

It should particularly be noted in this regard that defendants never moved for a change of venue.

The trial judge was not a candidate for an immediately forthcoming judicial election; and certainly no one could say from this record that the press was ever allowed to become "the dominant factor" in Judge Swinford's courtroom.

The admonitions to the jury not to read the newspapers or listen to radio or TV were in unmistakable language and repeated at every adjournment. See *Coppedge* v. *United States,* 272 F. 2d 504 (C. A. D. C., 1959); *Estes* v. *United States,* 335 F. 2d 609 (C. A. 5, 1964), *cert. denied,* 379 U. S. 964 (1965).

The press comment on the trial, although frequently played on page one, was generally concerned with reporting what went into the trial record. The variances which were called to our attention do not in our judgment represent the "deliberate and highly prejudicial supplementation of the trial record" which was referred to in the dissenting opinion in Sheppard. See *Sheppard* v. *Maxwell, supra at —.*

This record does not disclose extrajudicial contacts with and communications to this jury.

Finally, we have every reason to believe that the jury

verdict in this trial was a "verdict . . . based upon the evidence developed at the trial." *Turner* v. *Louisiana,* 379 U. S. 466, 472 (1965).

While appellants rely upon *Briggs* v. *United States,* 221 F. 2d 636 (C. A. 6, 1955); *Marson* v. *United States,* 203 F. 2d 904 (C. A. 6, 1963), and *Stone* v. *United States,* 113 F. 2d 70 (C. A. 6, 1940), we find the factual distinctions between this case and those relied on to be both significant and determinative. The facts in this case pertaining to claimed prejudicial publicity are directly comparable to those in *Estes* v. *United States, supra.*

We also believe that the trial judge committed no error in denying the motion to suppress the evidence seized in this case. Rule 41 of the Federal Rules of Criminal Procedure recites in part:

> "The warrant shall be directed to a civil officer of these United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. . . ." Rule 41(c) Fed. R. Crim. P.

We have no doubt that the Internal Revenue Agents who served these warrants were properly designated under the terms of this rule. *United States* v. *Sigal,* 341 F. 2d 837 (C. A. 3, 1965); *United States* v. *Pasha,* 332 F. 2d 193 (C. A. 7, 1964), *Cert. denied,* — U. S. — (1965).

Further, we find no prejudicial error in Judge Swinford's charge when its language is taken as a whole and construed in context.

In this otherwise appropriate charge, however, the trial judge used two sentences which concern us. Referring to reasonable doubt he said: "It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror." We do not

believe that this language is desirable. While it may be argued that this simply tells the jury that it is not any captious doubt which should cause them to withold a verdict if otherwise convinced, it seems to us to place the Court in the position of urging a verdict with more emphasis than is appropriate.

These words also, however, must be viewed in relation to the totality of the Judge's charge on reasonable doubt. (See Appendix D.) Taken as a whole we believe that defendants suffered no prejudice therefrom.

In this regard and in relation to the numerous other issues presented by appellants which we have reviewed, we find no reversible error. Rule 52(a) Fed. R. Crim. P.; 28 U. S. C. § 2111.

Affirmed.

APPENDIX A.

(Testimony of plaintiff-appellee's witness Ruth Jane Siuda)

"Q. (By Mr. Lynch) How did that bundle come to be made?

"A. After we ran the work, the overlooks were pulled out of it, this, then I bundled the work.

"Q. Now, by 'bundled the work' what do you mean that you would do?

"A. Pull these books out of it and put a rubberband around it.

"Q. You would pull the books out?

"A. Yes.

"Q. By that you mean you would pull certain work out?

"A. Yes.

"Q. And how would the work ordinarily be placed, the work from which you would pull these books?

"A. It was all in boxes.

"Q. How many boxes for a day's work?

"A. Three.

"Q. Now, after you—observing the, this particular bundle dated 7/28/61, did you make the tape on that?

"A. Yes, I did.

"Q. How would you know which bundles to pull?

"A. Well, it was usually the same work all the time.

"Q. Well, would you have a particular figure or amount that you would pull?

"A. From 18 to $2,000.

"Q. And in addition to this work that you would pull in, the $18,000 to $2,000 that is a high figure, is that right? In other words, you would pull out a bundle that 18 would equal an $18 to $2,000 high?

"A. Yes.

"Q. What would be done with the other work?

"A. We would keep it three days and then put it in a box.

"Q. And what would happen to it after you put it in a box?

"A. I don't know what happened to it.

"Q. Well, what would you do with it?

"A. I wouldn't do anything with it, just put the work in the box.

"Q. Would you put the box in a particular place?

"A. Just left it in the office.

"Q. And when you came there the next morning would the box be there?

"A. No.

"Q. And the work that you put in this box after three days, the work that hadn't been pulled and bundled, were those the yellow bet slips?

"A. Yes.

"Q. Were those white sheets of paper the telephone work?

"A. Yes.

"Q. Now, do you know what proportion of the work that you would pull and bundle, what proportion that represented to the entire work for that particular day?

"A. Each day ran differently but I would say about a quarter of it.

* * *

"Q. Well, after you did this bundling operation from the previous day's work, how much work would remain after that?

"A. Oh, three-fourths of it.

"Q. And how many boxes similar to boxes such as are shown in government exhibit 199, would the remaining unbundled work fill?

"A. I don't know that it filled it but there would be two boxes.

* * *

"Q. Now, who would be the people who would go through the work and look for the hits?

"A. Who?

"Q. Who?

"A. All of us did it.

"Q. All of who?

"A. All the girls in the office.

"Q. Anyone else?

"A. We had about three girls, four girls come in.

"Q. Anyone else?

"A. Mr. Whitley, sometime.

"Q. Anyone else?

"A. Mr. Postell, sometimes.

"Q. Anyone else?

"A. No.

"Q. Now, after you went through and got the hits for each of the books, you would pull the tickets, mark them, somebody would compute the amounts of hits, is that correct?

"A. That's right.

* * *

"The Court: What was the total amount of money taken in by the house on the day numbers?

* * *

"The Court: Well, I mean from the time charged in this indictment, I don't think that is too material, but we will put it that way.

"Mr. Lynch: From the time she was in the Old Sportsman's Club Your Honor, that would cover it.

"The Court: From the time you were in the Old Sportsman's Club. Can you give me that? If you can't just say you can't.

"The Witness: I would say roughly about, roughly about $8500.00.

"The Court: Roughly $8500.00?

"The Witness: (Nods)."

APPENDIX B

(Testimony of Sidney William Macauley, Special Agent, Intelligence Division, Internal Revenue Service.)

"Q. (By Mr. Lynch) Now, turning to page 47 of this ledger, can you tell us what the figures are and will you demonstrate it on this machine and where the figures are obtained from?

* * *

"A. (Continuing) This page 47 in the journal is dated July 2nd. The expense column—your income column. This is the expense column. This is the difference. Now, let's

look at these figures here. Remember I went back a few pages, I went back five pages and the figure was $885 and some cents. The next page, the difference between expenses and income was $409 and then I read aloud the postings from the other pages, $1269, $1222, and this figure $2415.68 is shown here as $2415. If you were to add these five weeks figures, you would arrive at $6300. If you take 50% of it, divide it in half, half of $6300 is $3150. There is a small word here, which I don't know if you can read it, but it says 'house.' We have '10% Bud,' 10% of $3150 is $315, shown here. You subtract $3150 and $315 from $6300, you arrive at $2835, and it is marked over here, 'Junior and Louis.'

"If you divide the remainder, 2835, in half, you get $1417.50, Louis; $1417.50, Junior. . . ."

GOVERNMENT EXHIBIT No. 305

				47
		July 2		2415.68
Jr. and Tye	300.00	Bar		1784.15
Band	700.00	Craps		1005.00
Buddy	75.00	Ex Craps		490.00
Duck	30.00	Door		481.50
Andrews	41.00	Booker		33.75
Perry	21.00	Beat Dealers		33.20
Tom	50.00	Nigh Roll		968.00
Pitt	50.00			———
Ex Porter	25.00			4795.60
Lot man	20.00			
C. Johnson	25.00			
Worthy	15.00	2415.00		
D. Henny	130.00	1222.00		
RLD	54.00	1269.00		
Whisky	344.77	509.00		
Bar	307.25	885.00		
Coca Cola	26.40	———		
W. T. Wagner	9.10	6300.00		
New Way	31.51	3150.00	House	
10% Tax	109.49	315.00	10% Bud	
Fruit Products	15.40	2835.00	Jr. Lewis	
	———	1417.50	Lewis	
	2379.92	1417.50	Jr.	

APPENDIX C.

(Testimony of plaintiff-appellee's witness Edwin C. Schroeder)

"Q. (By Mr. Lynch) Showing you Government Exhibit 305, which is a ledger, referring you to page 47, of that ledger, and specifically to that portion of the page which has a series of figures on the righthand side with notations, '315 house, 315 10% Bud, Junior, Louis, Louis and Junior,' have you seen and made an examination of that?

"A. Yes.

"Q. Now, have you arrived at an opinion as to whether Government Exhibit 314, the slip with the 'Frank J. Andrews, O.K.', Government Exhibit 210-A the spiral notebook, the first page of the spiral notebook; and Government Exhibit 305, page 47 and the listings, the figures, the notations thereon, were written by the same person who wrote the signature cards which are Government Exhibit 237, signed by Frank J. Andrews, the American District Telegraph contract, which is Government Exhibit 299, and the checks, forming Government Exhibit 301?

"A. I have an opinion.

"Q. What is that opinion?

"A. It is my opinion that the writer of the various standard documents signed Frank J. Andrews is the author of the notations in the ledger, the lower right half, and the small slip of paper and the notations in the spiral notebook."

APPENDIX D.

"In the first place, these defendants, and each of them, are presumed to be innocent until their guilt is established to your satisfaction to the exclusion of a reasonable doubt. That presumption of innocence starts with them at the beginning of the case and remains with them throughout the trial, and must be overcome by evidence, before you can accept as evidence as establishing their guilt. You must start with the presumption that these defendants, and each of them, are innocent until their guilt is established to your satisfaction, as I say, to the exclusion of a reasonable doubt.

"The term reasonable doubt, as used in this instruction, is best defined by a use of the term itself. Don't be confused by reasonable doubt. It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror. It is very easy for a person in his own mind to say, "Well, true, I have a reasonable doubt." Well, that is a rather variable thing, what is reasonable and what is unreasonable. But I think as common sense men of everyday affairs, you do understand the difference between what is reasonable and what is unreasonable, and so this term reasonable doubt means just what it says. It is a doubt based upon reason, not some inconsequential doubt that might flit through the mind of a juror, not some slight mental hesitation that might guide you in determining the less significant affairs of everyday life; but a doubt for which there is reason, such a doubt as would guide you in determining the course of action in the conduct of your ordinary everyday living; a

doubt based upon reason, not some shadowy, inconsequential misgiving.

"Few things are capable of proof to absolute certainty and while it is required of the law that the United States should establish its case to the exclusion of a reasonable doubt, it does not mean that the United States should prove its case beyond all doubt. And if it were so required, it would be practically impossible for the United States to successfully carry out the prosecution of the laws. So that term reasonable doubt is used in the sense which I have undertaken here to define it to you.

"Now, your verdict must be unanimous. You are not to arrive at a verdict by casting lots, by holding a primary election, by drawing straws, but your verdict must be unanimous. It must be the verdict of each juror. Each juror must make up his mind what the verdict should be. . . ."

APPENDIX B

Judgment.

(Filed June 17, 1965)

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

No. 15,623.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK J. ANDREWS, et al.,
Defendants-Appellants.

JUDGMENT.

Before: MILLER, CECIL and EDWARDS, *Circuit Judges.*

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX C

Order Denying Petition for Rehearing.

(Filed August 30, 1965)

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

No. 15,623.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK J. ANDREWS, et al.,
Defendants-Appellants.

ORDER.

Before: MILLER, CECIL and EDWARDS, *Circuit Judges.*

Petitions for rehearing having been received and considered by the court in the above-styled appeal,

IT IS HEREBY ORDERED that said petitions be DENIED.

Entered by order of the court:

/s/ CARL W. REUSS,
Clerk.

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No. [redacted] 706

In The

SUPREME COURT OF THE UNITED STATES

PETER A. ANDREWS, JR., LOUIS TYE
AND
FRANK D. ANDRIOLA,
Petitioners,

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

WALTER S. HOUSTON
3466 Burnett Avenue
Cincinnati, Ohio, 45229
Attorney for Petitioners

EUGENE SMITH
18 East Fourth Street
Cincinnati, Ohio
Of Counsel

THE UNITED STATES ATTORNEY GENERAL
Washington, D. C. and
WILLIAM S. LYNCH
Room 2533
Department of Justice
Washington 25, D. C.
Attorneys for Respondent

COURT INDEX PRESS, INC. — Law Printers — 609 Walnut Street, Cincinnati, Ohio 45202

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In The

Supreme Court of the United States

October Term, 1965

No. 607

PETER A. ANDREWS, JR., LOUIS TYE
AND
FRANK D. ANDRIOLA,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Peter A. Andrews, Jr., Louis Tye and Frank D. Andriola, your petitioners, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on June 17, 1965.

OPINION BELOW.

The opinion of the Court below (Appendix B, *infra*, pp. 3A-20A) is reported at 347 F. 2d 207.

JURISDICTION.

The judgment of the Court below (Appendix C, *infra*, p. 21A) was entered on June 17, 1965. A timely petition for rehearing was denied on August 30, 1965 (Appendix D, *infra*, p. 22A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether it was proper for the trial judge to deny the request of petitioner's counsel during trial to interrigate the jury panel as if on *vior-dire* following the publication of numerous prejudicial newspaper items to determine whether or not the jury had read said items and were affected thereby.

2. Whether the trial judge's charge was improperly coercive under the doctrine of *Jenkins* v. *United States,* 380 U.S. 445, particularly when it was repeated after the jury had already deliberated for three days.

3. Whether the instruction to the jury on reasonable doubt, wherein the trial court also stated "it is not an excuse not to make a verdict," was prejudicially erroneous.

4. Whether the entire charge to the jury on willfulness was prejudicially erroneous.

5. Whether it was prejudicial error for the trial court to permit the prosecuting attorney in the presence of the jury after the witness for the government had invoked his privilege against self-incrimination to ask questions which he knew the witness would refuse to answer on the grounds of self-incrimination.

6. Whether there was sufficient evidence to sustain a conviction of the petitioners, Peter A. Andrews, Jr., Louis Tye and Frank D. Andriola in view of the decision in *Ingram* v. *United States,* 360 U.S. 672.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provisions and statutes involved are set forth in Appendix A, *infra,* pp. 1A-2A.

STATEMENT OF FACTS

The statement that follows set forth only such relevant facts as to present the questions in the present petition.

A. The Indictment.

The petitioners, Peter A. Andrews, Jr., Louis Tye and Frank D. Andriola were named in a thirty-five Count Indictment together with six (6) other defendants. Count one of said Indictment charged a conspiracy by all of the defendants to evade the excise tax on wages (I. R. C. 1954 § 4401) and to file false returns in violation of I. R. C. 1954, §§7201, 7206 (1) and 7206 (2), said conspiracy being in violation of 18 U. S. C. § 371.

The only overt act charged against Louis Tye is that he entered the Sportman's Club on August 3, 1961 (14).

The only overt act charged against Frank D. Andriola was that on or about June 29, 1961, he entered the Corner Liquor Store, 325 Central Avenue, Newport, Kentucky (7).

Peter A. Andrews, Jr., was charged with three overt acts namely on July 21st, 1961 he entered the Sportman's Club, on August 3, 1961 he entered the Sportman's Club and on August 9, 1961 he entered the Corner Liquor Store.

Counts two through thirty-two charge that wagers were made by some of the defendants for which an excise tax was due thereon for each of the months from February, 1959 through July 1961 in violation of 26 U. S. C. Section 7201 and 18 U. S. C. Section 2.

Count thirty-three charged unlawful use of telephone facilities in violation of 47 U. S. C. Section 203 (a) (3) and 501 and 18 U. S. C. Section 2.

Count thirty-four charged failure to pay the Special Occupational Tax, in violation of Title 26 U. S. C. Sections 4411 and 7203.

Count thirty-five charged failure to register by a person required to pay the Special Occupational Tax in violation of 26 U. S. C. Sections 4412 and 7203.

Peter A. Andrews, Jr., was indicted on Count One; Count Two through Twenty-Nine; Count Thirty-three; Thirty-Four and Thirty-Five. He was found guilty on each Count by a jury and was sentenced to Five (5) years and a $10,000.00 Fine on Counts One through Twenty-Nine, and One year on each of Counts Thirty-Three, Thirty-Four and Thirty-Five, all to run concurrently.

Louis Tye was indicted on Count One; Count Two through Thirty-Two and on Count Thirty-Three. He was found guilty on each Count and sentenced to Five (5) years on Count One through Thirty-Two plus a $10,000.00 Fine on Counts One through Thirty-Two and One Year on Count Thirty-Three, all to run concurrently.

Frank D. Andriola, was indicted on Count One; Count Two through Nine and on Count Thirty-Three. He was found guilty on Counts One through Nine and sentenced to Five (5) Years and a $10,000.00 Fine and one year on Count Thirty-Three, all to run concurrently.

B. The Evidence.

On February 2, 1959, petitioner leased the premises at 330 Central Avenue, Newport, Kentucky, to a partnership consisting of the defendants David Andrews, Owens and

Whitley, the lease (Govt. Ex. 128) providing (233a)[1] that "the partnership will procure and pay for and maintain all licenses and pay all taxes, state, federal, municipal or otherwise required for the conduct of any business which the business or any of the partners or servants or employees may conduct and operate in and on the buildings and premises hereby leased to them, including all real estate and personal property taxes."

The partnership openly conducted wagering operations on the premises, and the partners and most of their employees duly registered as required by the wagering tax provisions of the Internal Revenue Code (Govt. Ex. 1-121).

The wagering operations were conducted on the second floor of the premises.

Frank Andriola operated a Liquor Store on the premises known as the Sportsman's Club, 330 Central Avenue, Newport, Kentucky, for one Frank Confort. The Corner Liquor store address was 325 Central Avenue. The Liquor Store was duly licensed by the state and city. There was no evidence that Andriola had any dealings or connection with the partnership.

Louis Tye was Night Manager of the Bar located in the Sportsman's Club, his wages were $150.00 a week. He also worked during the day as a clerk in the Hand Book Operations at the Sportsman's Club. He had a stamp and filed form 11-C as an agent. He purchased the stamp to protect himself inasmuch as he worked during the day in the Hand Book Operation. The undercover agent never placed a bet with Tye.

Peter A. Andrews, Jr., was a Clerical Employee of the partnership whose duties involved adding slips, counting

[1] The letter "a" refers to the petitioner's Appendix below, copies of which have been filed with the Clerk of this Court.

money and operating the Night Numbers Machine for which he received a fixed salary of $150.00 a week.

C. Vital Occurrences at the Trial.

1. *The Prejudicial Newspaper Publicity.*

On no less than nine occasions during the trial, counsel for petitioner brought to the attention of the court newspaper headlines and articles, alleged to be prejudicial, some of them referring to matters that had been excluded (354a, 483a, 654a, 1249a, 1390a, 1460a-1461a, 1995a-1996a, 2077a-2078a, 2136a-2137a, 2256a-2259a). In each instance counsel requested that the members of the jury be examined on *voir dire* to ascertain whether they had seen the articles in question, and in each instance the judge refused the request, saying on the first few of these occasions that he would not assume that the jurors would not heed his admonition not to read about the case in the newspapers (354a-356a, 483a-484a).

The jury was not locked up either during the trial or during the three nights that intervened from the beginning to the close of its deliberations.

The prejudicial newspaper publicity was as follows:

(a) On July 2, the trial court sustained an objection to the prosecution's showing that the numbers game on the 333 Central Avenue premises was rigged (290a-293a), the court saying, "It's highly inflammatory and just to show they are running a crooked game, if that's the only purpose for it, which has nothing to do with what they owe the Government on the tax" (293a).

Next morning, a headline on the front page of *The Cincinnati Enquirer,* Kentucky Edition, read, "U. S. Stopped From Showing Numbers Selection 'Rigged'" (Def. Ex. X).

(b) On Wednesday, July 4, the banner headline on *The Kentucky Post Times and Star* proclaimed "Gaming Club's 'Secrets' Bared" (Def. Ex. X-1). The trial judge admitted (483a) that "it is a rather glaring headline," but again denied the motion to examine the jurors on *voir dire* because he would not "have the jury catechized every morning before we start court to see whether or not they have violated their oath and violated their obligations as jurors to observe the court's instructions, simply because the newspapers are writing up this case" (484a).

(c) On July 6, *The Cincinnati Enquirer,* Kentucky Edition, had on its front page a picture of Mary Jo Williams, who had testified at length on the preceding day (582a-635a), with the caption "Widow Terrified, Denies Andrews' Story" (Def. Ex. X-2). A renewed motion for a *voir dire* examination of the jury was denied for the reasons theretofore given (654a).

(d) The same paper's story on July 11 headed, "Andrews' Huge Deposits Shown," was the subject of another motion for *voir dire* examination, which was denied (1249a).

(e) A similar motion was made and denied on the following day (1390a) in respect of the July 11 edition of the *Kentucky Post and Times Star* (Def. Ex. X-3-0), which had first page headlines reading "Say Checks For Andrews On Numbers. Deposited to Personal Account, Witness Testifies."

(f) Later on the same day an identical motion was made and denied (1460a-1461a) in connection with the same paper's issue of July 12 (Def. Ex. X-3), the first page of which had a story headed "Aide Links Andrews With Club" that continued at length on p. 22.

(g) Petitioner's motion for similar questioning of the jury was again denied a few days later (1995a-1996a); on that occasion the basis for the motion was a headline in

The Kentucky Post and Times Star of July 17 reading "Unwilling Witness Tells of Phone Call" (Def. Ex. X-5), and one in the July 18 issue reading, "Government Near End in Racket Case" (Def. Ex. X-6). When counsel was asked by the court whether he was able to represent that the jurors had in fact violated the court's admonitions, he replied (1996a), "No, I do not know that. It would only be determined after we inquired on *voir dire*."

(h) On the following day, counsel complained of a *Cincinnati Enquirer* headline reading "U. S. Plays Trump Card in Andrews Tax Evasion Trial" (Def. Ex. X-7), saying (2077a), "* * * we suggest to the Court no one heard of this language before in the courtroom, that it is a news editorial and prejudicial to these defendants, and for those reasons we move to inquire as to whether the jurors have read this paper, heard any similar radio news account or telecast account." Once more the motion was overruled (2078a).

(i) Later on the same day, a further motion for examination of the jurors was made in respect to a *Kentucky Post* headline dated July 19, with a banner first page headline reading "Recess Seen in Numbers Trial" (Def. Ex. X-9), the text of which set forth petitioner's contention that he was only a landlord after asserting that some of the papers seized by raiding Internal Revenue agents were identified by a handwriting expert as bearing his name (2136a-2137a): "If any of the jurors have read that, we believe that misstatement by the paper would be highly prejudicial to the rights of my defendant." Once more, "for the same reasons," motion overruled (2137a).

2. *The Charge as to Hung Juries and the Duty of a Jury to Reach Agreement.*

The judge's charge in chief extends to 55 pages of the transcript (2178a-2224a). On the second page he said:

> "We have in this country I am afraid all too frequently what is known as hung juries, when the jurors are unable to agree. While, of course, the purpose of the jury trial is that it would be tried by men of varying degrees of experience and yet they are men who are supposedly capable of making up their minds on a given set of facts. All too frequently we have, I say, what is known as a hung jury which is no credit to the individual juror or to the jury itself or to the system or to the Court. I suppose that if there would be enough hung juries we would probably abolish the jury system for there has to be something to be progressive in the administration of justice and not a stumbling block." (2179a).

In the course of defining reasonable doubt, he charged:

> "The term *reasonable doubt,* as used in this instruction, is best defined by a use of the term itself, Don't be confused by reasonable doubt. It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror" (2184a).

The judge further charged (2185a-2187a):

> "But before you make up your mind, gentlemen, you should give due regard and consideration to the reasoning and recollection and understanding of your fellow jurors. I am confident that every man on that jury, possibly none of you have ever known each other before you served together on this jury, but let me assure you that each man on that jury is just as

anxious to do the right and proper thing in this case as you are. And before you make up your verdict, and I firmly believe that, before you make up your verdict or make up your mind what the verdict should be, you should give due regard to the reasoning and recollection, arguments, of your fellow jurors.

"A reasonable man is an awfully good kind of a citizen. I know there are those who have won fame by being stubborn and hardheaded. Somehow or other, I think the man that really keeps things going in this world is the reasonable man, the man who is willing to give and take, who is willing to accede that the other fellow's views might, after all, not be entirely nonsensical.

* * *

"I have never served on a jury, but I have known a lot of people who have and I have been told that you go to a jury room and some one or two or more of the jurors immediately announce what the verdict will be and that they will stay there all day or all night or some other such extravagant statement, mistaking I am afraid hardheadedness and stubbornness with strong-mindedness. Well, such a person is not a good juror, not a good citizen, because he doesn't understand the meaning of an oath. Your oath carries through on that as it does on other things. So I ask you when you go to your jury room to see if you can make up your mind and make a verdict in this case. If you can't, you can't and I wouldn't undertake to require you to make a verdict. I couldn't if I wanted to and I wouldn't if I could. That is your free prerogative, but I do want you to understand that it is a responsibility which should not be lightly shirked. It is very easy to get into the jury room and not too concerned, 'Oh, well, let's let some other jury decide it. We just won't make any verdict.' I hope you won't take that attitude and I have every confidence that you won't."

This was on the morning of July 25, a Wednesday.

On the afternoon of Saturday, July 28, the Court of its own motion told the jury (2262a-2263a):

> "The case was finally submitted to you, as I recall, about 1:00 o'clock on Wednesday and here it is Saturday afternoon and the case does not, could not, it would seem to me, require nearly that much time to decide. I don't know whether you are assuming a responsibility that makes you feel you have to examine each bit of evidence by way of exhibit, in other words, whether you can't see the woods for the trees. This case has covered—this is the end of five weeks trial and we had four weeks of testimony and two days, I might say, of argument. It would be practically impossible to expect the jury to take up every conceivable bit of evidence by way of exhibit that has been offered in this case, but to look at the whole case, examine the whole thing as a whole as I tried to outline to you, draw what reasonable inferences may be drawn from the case. The exhibits are a part of the evidence, an important part of the evidence, but they are not all of the evidence. And I am going to ask you to resume your deliberations, taking into consideration that many of these counts in this indictment are very similar. It would seem that if a person were guilty or not guilty of one, the same thing would apply to many of the others. You have eight defendants here."

The next to last sentence quoted was objected to, without avail (2264a-2265a).

3. *The Charge on Reasonable Doubt.*

In addition to, and immediately following the reference to reasonable doubt previously quoted (*supra*, p. 9) the district court instructed the jury:

> "But I think as common sense men of everyday affairs, you do understand the difference between what is

reasonable and what is unreasonable, and so this term reasonable doubt means just what it says. It is a doubt based upon reason, not some inconsequential doubt that might flit through the mind of a juror, not some slight mental hesitation that might guide you in determining the less significant affairs of everyday life; but a doubt for which there is a reason, such a doubt as would guide you in determining the course of action in the conduct of your ordinary everyday living; a doubt based upon reason, not some shadowy, inconsequential misgiving." (2184a).

4. *The Charge on Intent.*

In his charge, the trial judge told the jury (2180a) that "this is a tax evasion case," and a little later said (2182a):

> "Your question is simple and narrow: Did they pay the taxes due under the law? * * * Your business is this: Did they pay the taxes under the law?"

Despite appellant's Request for Charge No. 6 (2163a-2164a), the district court instructed the jury as follows:

> "You will notice when I refer to this indictment a little later that it charges that these defendants did 'willfully and knowingly' do certain things. 'Willfully, and knowingly' implies what went on in their minds. This is offense which requires a criminal intent and therefore you must find, before you can find these defendants or any of them guilty, that they intended, that they committed a violation of the law intentionally. The question of intent is always somewhat confusing unless we look at it rationally and rationalize about it. So far, science has never reached the place where you can take some sort of an instrument and look into a man's head or into his brain and see what he is thinking. That is not visible; thought, after all, is not a substance, it is not a mass. The brain is a mass, but the thought is not. What you may intend to do is not

reflected in any of your physical parts or what you are thinking is not reflected in any of your physical parts. And so the law is bound then to accept the next best text and that is that a person is presumed to intend the natural consequences of his own deliberate acts. And you have to judge what is in his mind by what he does and the reasonable inferences which may be drawn from it. The United States is not required to produce someone here to establish beyond a reasonable doubt just what these defendants had in their minds at all stages of this alleged offense, but it shows by evidence and introduces witnesses and examines these witnesses in your presence and for your benefit and subject to cross-examination by the defendants, to bring out the facts and then you, from those facts, are to determine whether or not these defendants or any of them or all of them intended to defeat the tax collector in his efforts to receive from them the amount of taxes which the United States says were due. So, you are not to be confused by that thing intent. That, again, is not something to hide behind to keep from making a verdict. You reach that fact as you would any other fact. A person intends, under the law the natural consequences of his own deliberate acts and you have a right to determine that question of intent by the whole evidence in the case and by the actions and conduct of the defendants." (2190a-2192a).

Objection was specifically made that the charge did not include willfulness as an essential element as follows:

"In the first portion of your charge to the jury, you made the statement that the issue is narrow and simple, it is a tax evasion case and a few moments later you said the question is, did they pay the taxes due under the law, and while Your Honor did charge the jury that it must be knowingly, willfully and unlawfully, I believe that Your Honor gave undue emphasis to the fact that the only question is did they pay taxes due

under the law. I think also of equal importance and maybe of greater importance is the fact that did they do it unlawfully, willfully and knowingly, and I ask the Court to perhaps correct to the jury the misapprehension that the only question offered is, did they pay taxes due under the law." (2229a-2230a)

This objection was overruled (2230a).

On the morning of Friday July 27, after a day and a half of deliberation, the jury asked for further instructions on the conspiracy charge, count 1 (2245a).

Following some three pages of explanation (2245a-2248a), counsel for this appellant requested clarification—"you said the mere fact that he knew that there was an illegal operation there would make him guilty" (2249a)—the Court further charged as follows:

> "Bear in mind, as I have emphasized, the day before yesterday in my charge, the charge here is the withholding of this excise tax, that is the offense charged, and the knowledge which is set forth in the charge is knowledge that the tax purposes were being defeated and that the government was being defrauded of its taxes. That is the charge contained in the indictment. *As I told you, it is a narrow proposition. Did they account for the tax or did they not,* and if they didn't, who was responsible or who participated in it under the general rule I have given you, under the law of conspiracy." (2250a-2251a, emphasis supplied.)

Again there was objection and again it was overruled; the colloquy was in these terms (2252a):

> "MR. WEINTRAUB: Your Honor again said to the jury, just a moment ago, that the issue is narrowed down to one thing, did they pay the taxes. Now, I think in view of that statement, you ought to tell them that it is not only that, but did they wilfully fail to pay,

because when you tell the jury that the only question is—it is not only did they fail to pay the taxes—

THE COURT: I think I have covered that all sufficiently.

MR. WEINTRAUB: Well, I think you leave them with the issue is, did they fail to pay the taxes. It isn't only that but did they wilfully and deliberately fail to do it.

THE COURT: Overruled. I have covered that repeatedly."

5. *Questions Concerning Prior Grand Jury Testimony Put to Witness Who Had Invoked Privilege Against Self-Incrimination.*

A witness, Joseph Harris (1648a-1666a) testified to a conversation with this petitioner in June or July 1959 in which the latter inquired whether Harris would be interested in the Copa Club at 333 Central Avenue (1649a-1651a). Harris testified that there was no reference in that conversation to the numbers business at the Copa Club (1653a). Thereupon, in response to further questions, he admitted having testified before the grand jury (1653a, 1656a). He was then read an answer purportedly given by him before that body (1656a), in which he quoted the appellant as saying, *inter alia,* "I don't need the Copa Club, I got the numbers going for me," and also "he said there was no numbers involved, so all I want you to do is to book the shows and operate the club and so forth."

Motion for a mistrial was made and overruled (1656a-1657a), and in a colloquy, the defense's request for the grand jury minutes from which the prosecution was reading was denied (1657a-1661a).

Following an admonition by the court that the prosecution's question was not to be considered as any evidence against the defendants (1662a), the witness' previous grand

jury answer was again read to him; he claimed the privilege against self-incrimination (1663a, 1665a). Objection to another question based on a grand jury answer was sustained because non-contradictory (1663a-1664a). The prosecution recurred to a further grand jury answer that had this petitioner saying to the witness that if the witness "would go back to the bottoms they would put together this numbers racket and consolidate it into one racket," again there was objection, again the witness invoked privilege, and again a motion for mistrial was made and overruled, the court simply repeating the admonition that the questions were not evidence against the defendants (1664a-1665a).

Once more the witness was read one of his grand jury answers concerning his suggesting the name of one Holtzman to this petitioner to take over the Copa Club, "so I called Mr. Holtzman and he talked to Mr. Andrews and it was only a matter of a few days until Mr. Holtzman was working, running the club for Mr. Andrews;" objection was sustained, and a motion for mistrial was denied (1665a-1666a).

D. The Opinion Below.

On appeal, the court below affirmed, largely in reliance, so far as the question of adverse newspaper publicity was concerned, on its own recent decision in *Sheppard* v. *Maxwell,* 346 F. 2d 707, pending on petition for certiorari, No. 490, this Term. It relied on the fact that the present case was less flagrant than that one; that here there had been no motion for change of venue; and that the case was factually different from its own earlier decisions in *Briggs* v. *United States,* 221 F. 2d 636; *Marson* v. *United States,* 203 F. 2d 904; and *Stone* v. *United States,* 113 F. 2d 70.

It criticized the trial judge's charge, saying (*infra*, Appendix B, p. 11A):

> "Referring to reasonable doubt he said: 'It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror.' We do not believe that this language is desirable. While it may be argued that this simply tells the jury that it is not any captious doubt which should cause them to withhold a verdict if otherwise convinced, it seems to us to place the Court in the position of urging a verdict with more emphasis than is appropriate."

But, taking the charge as a whole, the court below concluded that petitioner was not prejudiced.

At to the other issues that were presented by petitioner the court found no reversible error citing Rule 52(a) Fed. R. Crim. P.; 28 U.S.C. § 2111.

REASONS FOR GRANTING WRIT

First. The trial court's right to refuse to interrogate a jury panel following prejudicial publicity on the grounds of his admonition presents a new principal in the Free Press vs. Fair Trial controversy.

1. The dilemma created by the constitutional right of a defendant to a fair trial as opposed to the constitutional right of a free press was recognized by this Court as early as 1878 in *Reynolds* v, *United States.*

> "Unfavorable publicity to a defendant given in newspapers about a pending jury trial is not necessarily grounds for setting aside a verdict, but under certain circumstances may result in prejudice to a defendant so as to cause a mistrial. Generally, an incorrect unfavorable report of the evidence presented against a

> defendant on a material issue, which comes to the attention of a juror or jurors during the pendency of the trial raises a rebuttable presumption that the rights of the defendant have been prejudiced. The District Judge should ascertain if the report has come to the attention of a juror and if so, take the necessary steps to rebut such presumption, and if not convinced that the presumption has been rebutted, declare a mistrial * * *." *Krogmann* v. *United States,* 225 F. 2d 220, 228 (Sixth Circuit; 1955).

The trial judge has a large discretion in ruling on the issue of prejudice resulting of the reading of news articles concerning the trial. (*Marshall* v. *United States,* 360 U. S. 310). However the Court must make such inquiry, see *Brigg* v. *United States,* 221 F. 2d 363; *Marson* v. *United States,* 203 F. 2d 904; *King* v. *United States,* 25 F. 2d 242.

2. The real vice here is that the trial judge refused to make the inquiry that the court below had earlier held was required (*Marson* v. *United States,* 203 F. 2d 904, 911): "Upon the showing of appellant's counsel, it was the duty of the court to interrogate the members of the jury to ascertain whether they had seen the newspaper articles and, if so, whether it had created any prejudice in their minds."

It is therefore no answer to say that the publicity in the Dr. Sam Sheppard case was a more shocking instance of journalistic incursions on the basic right to a fair trial; that case, whatever its ultimate outcome—as noted, it is now pending here as No. 490—is wholly different in two respects. First, it was a collateral attack on a State court judgment ten years later, not direct review of an original Federal conviction as here; second, even in the *Sheppard* case, the trial judge did question the jurors whether they had heard a particular offensive broadcast. 346 F. 2d at 751.

Other circuits, without exception, have uniformly enforced the duty of making inquiry on request.

Representative decisions include *Coppedge* v. *United States,* 272 F. 2d 504 (C. A. D. C.), where the court held inadequate a very generalized inquiry; *United States* v. *Bentvena,* 319 F. 2d 916, 934 (C. A. 2), where a juror who was shown the offending account by his wife but refused to discuss it with her was none the less discharged from the jury; *United States* v. *Vita,* 294 F. 2d 524 (C. A. 2), certiorari denied, 369 U. S. 823, where a juror who admitted reading the prejudicial article was excused and an alternate substituted; *United States* v. *Carlucci,* 288 F. 2d 691, 694-695 (C. A. 3), certiorari denied, 366 U. S. 961, where the judge "meticulously questioned" every juror; *United States* v. *Milanovich,* 303 F. 2d 626, 629-630 (C. A. 4), certiorari denied, 371 U. S. 876, where the court of appeals emphasized the duty of the trial judge to determine whether the prejudicial matter had reached any juror; and *Accardo* v. *United States,* 298 F. 2d 133, 136 (C. A. 7), where the court said that the district judge "should have, by the careful examination of each juror, out of the presence of the others, determined the effect of the articles on those who had read them and whether they had discussed the articles with others." In that case, the Seventh Circuit said, in language fully applicable here, that (298 F. 2d at 136) "The judge's general admonitions at the beginning of the jury selection, his assumption of their effectiveness, and his instructions, were inadequate protection."[2]

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[2] In numerous other cases involving prejudicial newspaper publicity, the reports show that the trial judge in fact inquired whether the offending articles had been read by the jury. E.g., *United States* v. *Agueci,* 310 F. 2d 817, 831-832 (C. A. 2), certiorari denied, 372 U. S. 959; *Cohen* v. *United States,* 297 F. 2d 760, 763-764 (C. A. 9), certiorari denied, 369 U. S. 865; *United States* v. *LaBarbera,* 273 F.

Estes v. *United States,* 335 F. 2d 609, certiorari denied, 379 U. S. 964, cited—and apparently relied on—by the court below, was wholly different; there no request for inquiries directed to the jurors was made until after the close of the evidence. Here, to the contrary, such a request was made on each occasion that the prejudicial material appeared.

Except for the ruling now sought to be reviewed, we know of no appellate decision approving the denial of a motion for *voir dire* examination of the jury to ascertain whether any jurors had in fact seen the prejudicial publicity. The unanimity with which Federal trial judges throughout the land have made such inquiries even without express request once the existence of improper newspaper comment is made manifest demonstrates that, by the consensus of judicial opinion, a generalized admonition not to read about the case in the newspapers is deemed wholly insufficient once the prejudicial accounts have in fact appeared.

The present case, therefore, which takes a wholly different approach in a situation that recurs again and again, is in clear conflict with decisions of courts in other circuits and accordingly calls for further scrutiny here.

3. We mention, simply to show that it has not been overlooked, the suggestion of the court below that petitioner did not move for a change of venue. The short and indeed conclusive answer to this notion was given by the First Circuit in *Delaney* v. *United States,* 199 F. 2d 107, 116:

2d 547 (C. A. 2); *United States* v. *Carruthers,* 152 F. 2d 512 (C. A. 7), certiorari denied, 327 U. S. 787; *Itow* v. *United States,* 223 Fed. 25, 28 (C. A. 9).

> "The right to apply for a change of venue is given for the defendant's benefit and at his option. He is not obliged to forego his constitutional right to an impartial trial in the district wherein the offense is alleged to have been committed."

The issue presented here is publicity during trial, not prior to trial. Change of venue motions must be made before trial. To require a defendant to anticipate unfair publicity and move for a change of venue presents a second new and novel proposition in the dilemma of Free Press vs. Fair Trial.

Second. We think the judge's charge here, particularly the portion thereof given on the fourth day of the jury's deliberation (2262a-2263a; *supra,* pp. 9-12)—a portion, significantly enough, nowhere included in Appendix D to the opinion below (*infra,* pp. 19A-20A)—was improperly coercive within this Court's recent decision in *Jenkins* v. *United States,* 380 U. S. 445, reversing 330 F. 2d 220 (D. C. Cir.).

1. By way of preliminary, we note that the charge-as-a-whole doctrine, that venerable catch-all for sweeping under the judicial rug every inconvenient error committed at the trial, which the majority of the District of Columbia Circuit had relied on in the *Jenkins* case (330 F. 2d at 220-221), but to no avail, is subject to a logical difficulty, viz., that "We cannot speculate as to which part would be accepted by the jury * * *." *Price* v. *United States,* 200 F. 2d 652, 655 (C. A. 5).

Thus, here, the language that the court below deemed "not * * * desirable," because "it seems to us to place the Court in the position of urging a verdict with more emphasis than is appropriate," was considered cured by "the to-

tality of the Judge's charge on reasonable doubt." But, to put the Fifth Circuit's language in the form of a question, "Which part would be accepted by the jury?"

2. Here the coercive aspect permeated the entire charge, and was moreover emphasized by being repeated after the jury had by over three days of deliberation demonstrated its inability to arrive at a verdict without coercion.

A. The trial judge early set up the hung jury as an ogre, and expressly—but quite improperly—told the jurors that a hung jury is discreditable to the individual jurors and to the jury, even to the extent of destroying the jury system (2179a, 2185a-2187a; *supra,* pp. 9-12). The law, of course, is quite otherwise; "a mistrial is as much a part of the jury system as a unanimous verdict." *Williams* v. *United States,* 338 F. 2d 530, 533 (C. A. D. C.).

Next, the trial judge told the jury, as to two essential elements of the offense, that they were not "an excuse not to make a verdict" (2184a) and "not something to hide behind to keep from making a verdict" (2192a). The trial judge encouraged compromise, approving "give and take" (2185a), and condemning firmness (2185a-2186a). Indeed, the trial judge said that a juror who remained steadfast was "not a good juror" and "not a good citizen" because "he doesn't understand the meaning of an oath" (2186a). Yet even the notorious *Allen* or "dynamite" charge (*Allen* v. *United States,* 164 U. S. 492, 501), which has yet to be condemned in its pristine form, constitutes reversible error when it fails to contain the qualification that if any individual juror still retains his views, he is not to yield his judgment simply because he is outnumbered. *United States* v. *Rogers,* 389 F. 2d 433, 434, 437 (C. A. 4); *Powell* v. *United States,* 297 F. 2d 318 (C. A. 5); *Green* v. *United States,* 307 F. 2d 852 (C. A. 5).

No such qualification was contained in the charge given here, before the jury retired (2179a, 2185a-2187a), yet the court below held the charge cured by the trial court's abstractions concerning reasonable doubt.

B. But, bad as the charge was originally, its prejudicial content was compounded by the additional charge given after the jury had deliberated unsuccessfully for over three days. At that point, the trial court pressed hard for a verdict, calling attention to the lapse of time, and finally saying to the jury it did not need to examine all the evidence (2262a-2263a):

> "And I am going to ask you to resume your deliberations, taking into consideration that many of these counts in this indictment are very similar. It would seem that if a person were guilty or not guilty of one, the same thing would apply to many of the others."

Objection proved fruitless (2264a-2265a); the law that such a charge was improper was ignored (*Blunt* v. *United States,* 244 F. 2d 355, 367-368 (C. A. D. C.)); and the impact of the erroneous instruction was magnified because it came on the fourth day of the jury's deliberations. For, as this Court said in *Bollenbach* v. *United States,* 326 U. S. 607, 612:

> "Particularly in a criminal case, the trial judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

In context, therefore, the charge as supplemented was plainly and erroneously coercive. *Jenkins* v. *United States,* 380 U. S. 445.

Third. In this country a defendant must be given the benefit of a reasonable doubt. A reasonable doubt is "an excuse" to render a verdict of not guilty. The instruction given on reasonable doubt would prevent a jury from bringing a verdict of not guilty because they had a reasonable doubt. And when the trial court stated "So that term reasonable doubt is used in the sense which I have undertaken here to define it to you," (*infra,* p. 19A), the petitioner was indeed gravely prejudiced. The court had stated to the jury that "It is very easy for a person in his own mind to say, 'Well, true, I have a reasonable doubt.' " (*infra,* p. 19A). If the evidence in a case is such that it is "very easy" for a juror to have a reasonable doubt there should be a verdict of not guilty. The district court instructed the jury that they should not "be confused by reasonable doubt." We submit the jury had to be confused.

Further, the instruction on reasonable doubt was fundamentally erroneous, since it reduced the content of the term to "such a doubt as would guide you in determining the course of action in the conduct of your everyday affairs." As such, it is obviously inconsistent with the philosophy expressed by this Court in *Holland* v. *United States,* 348 U. S. 121, 140; see also *United States* v. *Heap,* 345 F. 2d 170 (C. A. 2); *Scurry* v. *United States,* 347 F. 2d 468, 469-470 (C. A. D. C.).

With these words fresh in their ears, the jury retired and after a short interval returned the verdict of guilty against the petitioner.

Fourth. In *Ingram* v. *United States,* 360 U. S. 672, which, like the present appeal, involved a conviction for violating 18 U. S. C. § 371 by conspiring to evade the payment of the wagering tax, the Supreme Court said (360 U. S. at 678):

> " '[C]onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself.' [Footnote 9 omitted.] The substantive offense which Smith and Law were accused of conspiring to commit was the willful evasion of federal taxes, an offense which ,even presuming knowledge of the tax law, obviously cannot be committed in the absence of knowledge of willfulness. *Spies* v. *United States, supra. Cf. United States* v. *Falcone,* 311 U .S. 205."

The necessary result of the direction that "a person is presumed to intend the natural consequences of his own deliberate acts" was to create a presumption of specific intent inconsistent with the presumption of innocence. *Morissette* v. *United States,* 342 U. S. 246, 273. As there held, such a statement has no proper place in a charge relating to a criminal offense where specific intent and bad purpose are essential elements. Such instruction is condemned as fundamentally prejudicial. *Mann* v. *United States,* 319 F. 2d 404, 407, 410 (C. A. 5); *Chappell* v. *United States,* 270 F. 2d 274 (C. A. 9); *Block* v. *United States,* 221 F. 2d 786, 788-789 (C. A. 9).

And in his further instructions, given after the jury had requested clarification following deliberations for a day and a half, the trial judge not only failed to mention intent, but rejected the suggestion that he do so.

The heart of the supplementary instruction (2251a) was, "As I told you, it is a narrow proposition. Did they account for the tax or did they not," and the heart of the objection (2252a) was, "I think you leave them with the issue is (sic), did they fail to pay the taxes. It isn't only that but did they willfully and deliberately fail to do it."

Yet at this critical juncture, the court overruled the objection (2252a), and left the case to an obviously troubled

jury as a problem in arithmetic, viz., whether the full 10% tax that the United States levies on gambling enterprises had been paid.

Since willfulness is an essential ingredient of the offense of conspiracy of which this petitioner was convicted, and since at a critical juncture of the proceedings the case was left with the jury under instructions that omitted all mention of willfulness, reversal for a new trial is required.

Fifth. The witness James Harris was sought to be impeached, in respect of his denial that his conversation with this appellant had referred to the numbers business at the Copa Club, by means of an allegedly prior contradictory statement before the grand jury (1653a, 1655a-1656a). But in that statement, the appellant according to the witness had carefully differentiated between the Copa Club and the numbers business (1656a-1657a); the statement was therefore not contradictory.

When the answer was read again, the witness invoked privilege, and did so with respect to several other prior grand jury answers (1663a-1665a).

The resultant error is denounced by Wigmore and in two Circuits, because, in fact, it brings before the trial jury matter that is incompetent.

Wigmore says (3 *Evidence* (3d ed. 1940) § 1043):

> "It ought to follow that, where the witness *now* claims to be *unable to recollect* a matter, a former affirmation of it should be admitted as a contradiction. But Courts have usually forbidden this, because the improper effect is apt to be to give a testimonial value * * * to the former statement; its aspect as a mere contradiction being naturally overshadowed."

Accordingly, both the District of Columbia Circuit and the First Circuit have held it reversible error to attempt to

contradict with prior testimony a witness who at the trial is unable to recall the transaction about which he is being questioned.

In *Young* v. *United States,* 214 F. 2d 232 (C. A. D. C.), it was held reversible error to read before the trial jury, on the theory of refreshing recollection, the witness' prior grand jury testimony (p. 237):

> "* * * Government counsel was permitted to read aloud much more of (the witness') grand jury testimony. This was not refreshing the witness' recollection. It was placing before the trial jury testimony previously given before a grand jury when there had been no cross-examination and defendant was not confronted with the witnesses against him."

In *Westinghouse Electric Corp.* v. *Wray Equipment Corp.,* 286 F. 2d 491 (C. A. 1), similar use of a prior deposition, where of course the witness had been subject to cross-examination, was held error, the court saying (p. 493):

> "The cases are clear, however, that a deposition used in an attempt to refresh the witness' recollection is not itself admissible as evidence. * * * When a witness is unable to recall a past transaction, the majority of the cases do not allow a prior statement of the witness concerning that transaction to be introduced as a prior inconsistent statement."

And, after citing Wigmore, § 1043 (*supra*), the court added in a footnote, "Wigmore states that the basis of this exclusion is the possibility of improper testimonial effect being given to the prior statement. The instant case presents a forceful example of this danger" (286 F. 2d at 493, footnote 2).

Indeed, the case at bar shows an *a fortiori* situation. As Wigmore noted (§ 1043 at p. 737), there may well be

situations where the witness' presently asserted lack of memory would be contradicted in fact by prior recent testimony showing an acute memory a little earlier. But when, as here, the witness invokes privilege, there is nothing whatever to be contradicted; the witness' invocation of his privilege does not contradict any testimony he gave earlier.

It is true that the court here admonished the jury that the subject matter of the questions, which set forth the witness' grand jury answers, were not to be taken as evidence against the defendants (1662a, 1665a). But that is a distinction too delicate for lay jurors. In the words of Mr. Justice Cardozo, speaking for the Court in *Shepard* v. *United States,* 290 U. S. 96, 104:

> "Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds."

Sixth. "It is fundamental that a conviction for conspiracy under Title 18 Section 371 U. S. C. cannot be sustained unless there is proof of an argument to commit an offense against the United States." *Pereira* v. *United States,* 347 U. S. 1. There must be knowledge that taxes were due. "Without the knowledge, the intent cannot exist." *Direct Sales Company* v. *United States,* 319 U. S. 711; *Ingram* v. *United States,* 360 U. S. 172.

As to Frank Andriola the Operator of the Cornor Liquor Store, there is no evidence to connect him with the Sportsman's Club Operation. (P 5408).

Louis Tye was a Clerical Employee in the Hand Book and a Night Bartender. There is no evidence to connect him with the conspiracy or any of the other offenses.

Peter A. Andrews, Jr., was also a Clerical Employee and like Smith and Law in the *Ingram* case, were not sub-

jected to the tax, and had no knowledge of such tax not being paid.

To connect these three the Court must judicially enlarge a partnership legally existing presenting the three with liability but none of the profits.

It was especially prejudicial to make them a part of the partnership in view of the reading of Harris' Grand Jury Testimony. *Namet* v. *United States*, 373 U. S. 174, 187; *Douglas* v. *Alabama*, 380 U. S. 415.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WALTER S. HOUSTON
3466 Burnett Ave.
Cincinnati, Ohio 45229
Attorney for Petitioners

EUGENE SMITH
18 East Fourt St.
Cincinnati, Ohio
Of Counsel

APPENDICES

APPENDIX A

Constitutional Provisions and Statutes Involved.

The Fifth Amendment provides in pertinent part:

> * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *

18 U.S.C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * *

Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201, provides in pertinent part:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony * * *

Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7206, provides in pertinent part:

> Any person who—

(1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) *Aid or assistance.*—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;

* * *

shall be guilty of a felony * * *

Section 4401 of the Internal Revenue Code of 1954, 26 U.S.C. 4401, provides in pertinent part:

* * *

(c) Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him. (As amended Sept. 2, 1958, Pub. L. 85-859, Title I, § 151(a), 72 Stat. 1304.)

APPENDIX B

Opinion Below.

No. 15623

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
FRANK J. ANDREWS, WALTER OWENS, PETER A. ANDREWS, JR., WILLARD WHITLEY, GUS POSTELL, LOUIS TYE, FRANK D. ANDRIOLA, RUSSELL A. MALONE,
Defendants-Appellants.

APPEALS from the United States District Court for the Eastern District of Kentucky at Covington.

Decided June 17, 1965.

Before: MILLER, CECIL and EDWARDS, Circuit Judges.

EDWARDS, *Circuit Judge.* These appeals are from convictions for conspiracy to violate, and specific violations of the Internal Revenue Statutes by fraudulently concealing and withholding gambling excise taxes.

The first count of the indictments was a conspiracy count and the balance of the counts, 2 through 32, consist of the substantive counts of willful understatement of or failure to pay the excise taxes. Count 33 charged violation of the Federal Communications Act, and Counts 34 and 35 charged willful failure to register and pay the wagering occupational tax.

Defendant Frank J. Andrews was found guilty on Count 1 and received a sentence of five years and $10,000 fine. Defendant Daniel Andrews was severed because of his illness. The other seven defendants were found guilty on Count 1 and on a variety of the substantive counts. They were sentenced to terms of five years on each count for which they were convicted, except that Peter A. Andrews and Russell A. Malone were sentenced to only one year for their convictions on Counts 34 and 35. All seven were also fined $10,000 for conviction on Count 1. All of the sentences were made to run concurrently.

This trial was a sequel to large-scale,[1] illegal but wide open gambling operations in Newport, Kentucky. This record clearly establishes the nature and extent of the gambling. Indeed, no defendant, other than Frank Andrews, takes the trouble to deny being in the "business" of gambling during the time concerned. All do deny conspiring to evade federal wagering taxes and the substantive offenses charged.

Each of the several briefs filed on behalf of defendants argues the insufficiency of the evidence to support the verdicts and in this regard relies upon the applicable law as set forth in *Ingram* v. *United States,* 360 U. S. 672 (1959). In that case the United States Supreme Court affirmed convictions as to defendants Ingram and Jenkins (described as "entrepreneurs") and reversed as to defendants Smith and Law (described as "relatively minor clerical functionaries").

The Court's distinctions as set forth in the majority opinion of Mr. Justice Stewart thus:

---

[1] Computations of government evidence indicate total wagers during the times concerned of over five million dollars and a total tax evasion of over four hundred thousand dollars.

"But the evidence of agreement between Ingram and Jenkins to operate this gambling enterprise, which operation made them liable for federal taxes, and to conceal its operation and its income is clear on this record, and is virtually conceded by the petitioners. The evidence was sufficient to support a conclusion that they were engaged not only in a conspiracy to operate and conceal their gambling enterprise, but that they were also parties to an agreement to attempt to defeat or evade the federal taxes imposed upon the operators of such a business.

"As to Smith and Law, the case is quite a different one. While the record clearly supports a finding that Smith and Law were participants in a conspiracy to operate a lottery and to conceal that operation from local law enforcement agencies, we find no warrant for a finding that they were, like Ingram and Jenkins, parties to a conspiracy with a purpose illegal under federal law. Certainly there is nothing in the record to show that Smith and Law knew that Ingram and Jenkins had not paid the taxes, a fact obviously within the knowledge of the latter. . . ." *Ingram* v. *United States, supra* at 677.

Thus, we take it, convictions for conspiracy to evade federal gambling tax laws cannot be sustained absent proof 1) that defendants were parties to an agreement to defeat or evade the taxes, or 2) that defendants had knowledge that the taxes were due and were not being paid, plus conduct in furtherance of a plan to evade them.

We regard this record as establishing beyond all peradventure of a doubt at least two substantial, deliberate and interrelated schemes for large-scale federal tax evasion. The first such scheme relates to a method for reporting approximately one-quarter of the taxes actually due on the "day" numbers game and other related gambling activities. As testified to by Ruth Jane Siuda, one of the six girls who

"ran the work" on the "day" numbers, it was her job after the totalling of the work and after the hits had been determined to "pull the work." Her testimony leaves no doubt that this meant extracting the most convenient one-quarter of the bet slips so as to show a total take of $1,500-$2,000 per day, whereas in fact the daily total on this operation was $8,500. (See Appendix A.) The federal tax returns show clearly that taxes were paid only on the work thus "pulled."

The second major scheme for tax evasion involved the operation of a "night" numbers game. The record clearly establishes that no taxes were paid on this game at all, and it is argued to us that we should read the record as establishing that this game was within the exception to the wagering tax statute. Int. Rev. Code of 1954, § 4421(2)A.

The evidence, however, is overwhelmingly to the contrary, as obviously the jury found. It is patent that many of the persons participating in the "night" numbers operation were not on the premises at the time of the declaration of the winners and that the fact situation here involved large-scale telephone bet procedures, as well as the writing of bets off the premises.

As to Walter Owens, Willard Whitley, Peter Andrews, Jr., and Gus Postell, there can be no doubt about their status as entrepreneurs in relation to one or the other of the two major tax evasion schemes which we have referred to above. The records of the gambling partnerships, the tax return forms, and the testimony of Internal Revenue Supervisor William R. Tabb, and Agent Robert L. Thomas is ample to establish this.

We believe that the testimony of the Revenue Agents, plus Government Exhibit 305 (See Appendix B) is sufficient evidence from which the jury could have found Louis Tye and Frank ("Bud") Andriola guilty on the conspiracy

count as entrepreneurs likewise. Furthermore, their was testimony by a government handwriting expert that Exhibit 305 was in the handwriting of defendant Frank J. Andrews. (See Appendix C.)

As to Russell A. Malone, the testimony clearly indicates his role in advertising that no taxes were paid on the "night" numbers game, while at the same time assuring bettors that they did not in fact have to be present to win. Hence, his conviction on the conspiracy count seems warranted by the evidence herein. We regard it as consistent with the second of the two evidentiary standards set forth by Justice Stewart in the *Ingram* case.

As to Defendant Frank J. Andrews, the evidentiary situation relating to Count 1 is quite different. He was admittedly owner of "The Sportsman's Club" wherein these wide open gambling operations were conducted. It is his contention that his relationship to the club was entirely that of owner of the building and the landlord of those defendants who rented the premises. There is, however, strong circumstantial evidence that defendant Frank J. Andrews was more than a landlord. The unconcealed nature of the gambling operations conducted at his Sportsman's Club, his presence on the first day of the "consolidated operation" of the numbers business, his ordering the installation of the burglar alarm system at the new Sportsman's Club, his visits to the bookkeeping room where the girls "ran the work," the testimony which indicates that it was he who dealt with the competitive threat of Junior Andrews' location, the fact that he hired one of the telephone operators for the "night" numbers game, and the fact that substantial sums were paid out of the "day" numbers proceeds for taxes or rental owed by defendant Frank J. Andrews personally all represent facts from which this jury could have inferred that defendant Frank Andrews

had an entrepreneurial relationship to the gambling operation at the Sportsman's Club and knowledge of the two schemes for tax evasion which we have previously described.

Perhaps the most significant bit of evidence pertaining to Frank Andrews' knowledge and participation in the "day" numbers tax evasion scheme is the testimony which clearly establishes that Frank Andrews paid for construction of a hidden closet at the Sportsman's Club. This closet, controlled by an electrical attachment which "could be opened by touching two nails," was discovered at the time of the August 1961 raid. It contained the "pulled" and "bundled" work for July 1961. Testimony indicated that such "bundles" amounted to less than one-fourth of the total wagers. But the total of the "bundled" work found in the secret closet corresponded exactly with the amount of wagers reported for tax purposes for the month of July 1961.

In addition, testimony showed deposits of $103,000 in defendant Frank Andrews' bank account between October of 1960 and August of 1961. Many of these deposits to Andrews' account were made by an agent of the "day" numbers gambling partnership and over 100 of the checks deposited had symbols on them which were identified as the symbols of various numbers writers.

In short, we believe that the evidence of a substantial conspiracy to evade and defeat the payment of federal wagering taxes was overwhelming and that there was ample evidence to support the jury findings of guilty as to the conspiracy count of the indictment as to all of the defendants in this case within the rule of *Ingram* v. *United States, supra.*

As to the substantive counts, we do not contemplate such detail. Again, the proofs of willful evasion of taxes

offered by the government to support the various counts was overwhelming and uncontroverted.

The meticulous care with which the jury dealt with the individual indictments in this trial is demonstrated by the highly specific verdicts which were returned:

> "We the jury find the defendants as named.
> "Frank J. Andrews Guilty on Count 1—undecided on counts 2 thru 33.
> "Walter Owens guilty on counts 1 thru 33.
> "Peter A. Andrews, Jr., guilty on counts 1 thru 29 and 33-34-35.
> "Willard Whitley guilty on counts 1 thru 33.
> "Gus Postell guilty on counts 1 thru 15 and 33. Not guilty on 16 thru 32.
> "Louis Tye guilty on counts 1 thru 33.
> "Frank Andriola guilty on counts 1 thru 9 and 33.
> "Russell Malone guilty on counts 1 and 34, 35.
> "MELVIN HART, Foreman."

We have read the record and believe that there is ample proof to support the verdicts just recited.

The other important issue argued in this case pertains to the complaint, particularly by defendant Frank Andrews that pretrial and during trial publicity deprived him of due process of law and a fair and impartial jury trial.

This court has dealt recently and extensively with due process violation claims asserted to have been caused by press media prior to and during a criminal trial. *Sheppard* v. *Maxwell*, — F. 2d — (C.A. 6, 1965). Decided May 5, 1965.

It is certain that defendant's claim as to publicity do not begin to approach in quantity or possible prejudicial impact those asserted and rejected by the majority opinion in *Sheppard*.

As to the standards set in the dissenting opinion, the distinctions between the publicity impact upon this trial as compared to the Sheppard trial are numerous and important.

This was not a capital case.

There is no indication of public shock in this community over the crime of federal tax evasion being charged. This community had indeed been quite tolerant of defendant's "business."

It should particularly be noted in this regard that defendants never moved for a change of venue.

The trial judge was not a candidate for an immediately forthcoming judicial election; and certainly no one could say from this record that the press was ever allowed to become "the dominant factor" in Judge Swinford's courtroom.

The admonitions to the jury not to read the newspapers or listen to radio or TV were in unmistakable language and repeated at every adjournment. See *Coppedge* v. *United States,* 272 F. 2d 504 (C. A. D. C., 1959); *Estes* v. *United States,* 335 F. 2d 609 (C. A. 5, 1964), *cert. denied,* 379 U. S. 964 (1965).

The press comment on the trial, although frequently played on page one, was generally concerned with reporting what went into the trial record. The variances which were called to our attention do not in our judgment represent the "deliberate and highly prejudicial supplementation of the trial record" which was referred to in the dissenting opinion in Sheppard. See *Sheppard* v. *Maxwell, supra at* —.

This record does not disclose extrajudicial contacts with and communications to this jury.

Finally, we have every reason to believe that the jury

verdict in this trial was a "verdict . . . based upon the evidence developed at the trial." *Turner* v. *Louisiana,* 379 U. S. 466, 472 (1965).

While appellants rely upon *Briggs* v. *United States,* 221 F. 2d 636 (C. A. 6, 1955); *Marson* v. *United States,* 203 F. 2d 904 (C. A. 6, 1963), and *Stone* v. *United States,* 113 F. 2d 70 (C. A. 6, 1940), we find the factual distinctions between this case and those relied on to be both significant and determinative. The facts in this case pertaining to claimed prejudicial publicity are directly comparable to those in *Estes* v. *United States, supra.*

We also believe that the trial judge committed no error in denying the motion to suppress the evidence seized in this case. Rule 41 of the Federal Rules of Criminal Procedure recites in part:

> "The warrant shall be directed to a civil officer of these United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. . . ." Rule 41(c) Fed. R. Crim. P.

We have no doubt that the Internal Revenue Agents who served these warrants were properly designated under the terms of this rule. *United States* v. *Sigal,* 341 F. 2d 837 (C. A. 3, 1965); *United States* v. *Pasha,* 332 F. 2d 193 (C. A. 7, 1964), *Cert. denied,* — U. S. — (1965).

Further, we find no prejudicial error in Judge Swinford's charge when its language is taken as a whole and construed in context.

In this otherwise appropriate charge, however, the trial judge used two sentences which concern us. Referring to reasonable doubt he said: "It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror." We do not

believe that this language is desirable. While it may be argued that this simply tells the jury that it is not any captious doubt which should cause them to withold a verdict if otherwise convinced, it seems to us to place the Court in the position of urging a verdict with more emphasis than is appropriate.

These words also, however, must be viewed in relation to the totality of the Judge's charge on reasonable doubt. (See Appendix D.) Taken as a whole we believe that defendants suffered no prejudice therefrom.

In this regard and in relation to the numerous other issues presented by appellants which we have reviewed, we find no reversible error. Rule 52(a) Fed. R. Crim. P.; 28 U. S. C. § 2111.

Affirmed.

APPENDIX A.

(Testimony of plaintiff-appellee's witness Ruth Jane Siuda)

"Q. (By Mr. Lynch) How did that bundle come to be made?

"A. After we ran the work, the overlooks were pulled out of it, this, then I bundled the work.

"Q. Now, by 'bundled the work' what do you mean that you would do?

"A. Pull these books out of it and put a rubberband around it.

"Q. You would pull the books out?

"A. Yes.

"Q. By that you mean you would pull certain work out?

"A. Yes.

"Q. And how would the work ordinarily be placed, the work from which you would pull these books?

"A. It was all in boxes.

"Q. How many boxes for a day's work?

"A. Three.

"Q. Now, after you—observing the, this particular bundle dated 7/28/61, did you make the tape on that?

"A. Yes, I did.

"Q. How would you know which bundles to pull?

"A. Well, it was usually the same work all the time.

"Q. Well, would you have a particular figure or amount that you would pull?

"A. From 18 to $2,000.

"Q. And in addition to this work that you would pull in, the $18,000 to $2,000 that is a high figure, is that right? In other words, you would pull out a bundle that 18 would equal an $18 to $2,000 high?

"A. Yes.

"Q. What would be done with the other work?

"A. We would keep it three days and then put it in a box.

"Q. And what would happen to it after you put it in a box?

"A. I don't know what happened to it.

"Q. Well, what would you do with it?

"A. I wouldn't do anything with it, just put the work in the box.

"Q. Would you put the box in a particular place?

"A. Just left it in the office.

"Q. And when you came there the next morning would the box be there?

"A. No.

"Q. And the work that you put in this box after three days, the work that hadn't been pulled and bundled, were those the yellow bet slips?

"A. Yes.

"Q. Were those white sheets of paper the telephone work?

"A. Yes.

"Q. Now, do you know what proportion of the work that you would pull and bundle, what proportion that represented to the entire work for that particular day?

"A. Each day ran differently but I would say about a quarter of it.

* * *

"Q. Well, after you did this bundling operation from the previous day's work, how much work would remain after that?

"A. Oh, three-fourths of it.

"Q. And how many boxes similar to boxes such as are shown in government exhibit 199, would the remaining unbundled work fill?

"A. I don't know that it filled it but there would be two boxes.

* * *

"Q. Now, who would be the people who would go through the work and look for the hits?

"A. Who?

"Q. Who?

"A. All of us did it.

"Q. All of who?

"A. All the girls in the office.

"Q. Anyone else?

"A. We had about three girls, four girls come in.

"Q. Anyone else?

"A. Mr. Whitley, sometime.

"Q. Anyone else?

"A. Mr. Postell, sometimes.

"Q. Anyone else?

"A. No.

"Q. Now, after you went through and got the hits for each of the books, you would pull the tickets, mark them, somebody would compute the amounts of hits, is that correct?

"A. That's right.

* * *

"The Court: What was the total amount of money taken in by the house on the day numbers?

* * *

"The Court: Well, I mean from the time charged in this indictment, I don't think that is too material, but we will put it that way.

"Mr. Lynch: From the time she was in the Old Sportsman's Club Your Honor, that would cover it.

"The Court: From the time you were in the Old Sportsman's Club. Can you give me that? If you can't just say you can't.

"The Witness: I would say roughly about, roughly about $8500.00.

"The Court: Roughly $8500.00?

"The Witness: (Nods)."

APPENDIX B

(Testimony of Sidney William Macauley, Special Agent, Intelligence Division, Internal Revenue Service.)

"Q. (By Mr. Lynch) Now, turning to page 47 of this ledger, can you tell us what the figures are and will you demonstrate it on this machine and where the figures are obtained from?

* * *

"A. (Continuing) This page 47 in the journal is dated July 2nd. The expense column—your income column. This is the expense column. This is the difference. Now, let's

look at these figures here. Remember I went back a few pages, I went back five pages and the figure was $885 and some cents. The next page, the difference between expenses and income was $409 and then I read aloud the postings from the other pages, $1269, $1222, and this figure $2415.68 is shown here as $2415. If you were to add these five weeks figures, you would arrive at $6300. If you take 50% of it, divide it in half, half of $6300 is $3150. There is a small word here, which I don't know if you can read it, but it says 'house.' We have '10% Bud,' 10% of $3150 is $315, shown here. You subtract $3150 and $315 from $6300, you arrive at $2835, and it is marked over here, 'Junior and Louis.'

"If you divide the remainder, 2835, in half, you get $1417.50, Louis; $1417.50, Junior. . . ."

GOVERNMENT EXHIBIT No. 305

47

July 2

Jr. and Tye	300.00	Bar		2415.68
Band	700.00	Craps		1784.15
Buddy	75.00	Ex Craps		1005.00
Duck	30.00	Door		490.00
Andrews	41.00	Booker		481.50
Perry	21.00	Beat Dealers		33.75
Tom	50.00	Nigh Roll		33.20
Pitt	50.00			968.00
Ex Porter	25.00			4795.60
Lot man	20.00			
C. Johnson	25.00			
Worthy	15.00	2415.00		
D. Henny	130.00	1222.00		
RLD	54.00	1269.00		
Whisky	344.77	509.00		
Bar	307.25	885.00		
Coca Cola	26.40			
W. T. Wagner	9.10	6300.00		
New Way	31.51	3150.00	House	
10% Tax	109.49	315.00	10% Bud	
Fruit Products	15.40	2835.00	Jr. Lewis	
		1417.50	Lewis	
	2379.92	1417.50	Jr.	

APPENDIX C.

(Testimony of plaintiff-appellee's witness Edwin C. Schroeder)

"Q. (By Mr. Lynch) Showing you Government Exhibit 305, which is a ledger, referring you to page 47, of that ledger, and specifically to that portion of the page which has a series of figures on the righthand side with notations, '315 house, 315 10% Bud, Junior, Louis, Louis and Junior,' have you seen and made an examination of that?

"A. Yes.

"Q. Now, have you arrived at an opinion as to whether Government Exhibit 314, the slip with the 'Frank J. Andrews, O.K.', Government Exhibit 210-A the spiral notebook, the first page of the spiral notebook; and Government Exhibit 305, page 47 and the listings, the figures, the notations thereon, were written by the same person who wrote the signature cards which are Government Exhibit 237, signed by Frank J. Andrews, the American District Telegraph contract, which is Government Exhibit 299, and the checks, forming Government Exhibit 301?

"A. I have an opinion.

"Q. What is that opinion?

"A. It is my opinion that the writer of the various standard documents signed Frank J. Andrews is the author of the notations in the ledger, the lower right half, and the small slip of paper and the notations in the spiral notebook."

APPENDIX D.

"In the first place, these defendants, and each of them, are presumed to be innocent until their guilt is established to your satisfaction to the exclusion of a reasonable doubt. That presumption of innocence starts with them at the beginning of the case and remains with them throughout the trial, and must be overcome by evidence, before you can accept as evidence as establishing their guilt. You must start with the presumption that these defendants, and each of them, are innocent until their guilt is established to your satisfaction, as I say, to the exclusion of a reasonable doubt.

"The term reasonable doubt, as used in this instruction, is best defined by a use of the term itself. Don't be confused by reasonable doubt. It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror. It is very easy for a person in his own mind to say, "Well, true, I have a reasonable doubt." Well, that is a rather variable thing, what is reasonable and what is unreasonable. But I think as common sense men of everyday affairs, you do understand the difference between what is reasonable and what is unreasonable, and so this term reasonable doubt means just what it says. It is a doubt based upon reason, not some inconsequential doubt that might flit through the mind of a juror, not some slight mental hesitation that might guide you in determining the less significant affairs of everyday life; but a doubt for which there is reason, such a doubt as would guide you in determining the course of action in the conduct of your ordinary everyday living; a

doubt based upon reason, not some shadowy, inconsequential misgiving.

"Few things are capable of proof to absolute certainty and while it is required of the law that the United States should establish its case to the exclusion of a reasonable doubt, it does not mean that the United States should prove its case beyond all doubt. And if it were so required, it would be practically impossible for the United States to successfully carry out the prosecution of the laws. So that term reasonable doubt is used in the sense which I have undertaken here to define it to you.

"Now, your verdict must be unanimous. You are not to arrive at a verdict by casting lots, by holding a primary election, by drawing straws, but your verdict must be unanimous. It must be the verdict of each juror. Each juror must make up his mind what the verdict should be. . . ."

APPENDIX C

Judgment.

(Filed June 17, 1965)

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

No. 15,623.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK J. ANDREWS, et al.,
Defendants-Appellants.

JUDGMENT.

Before: MILLER, CECIL and EDWARDS, *Circuit Judges.*

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX D

Order Sur Petition for Rehearing.

(Filed August 30, 1965)

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

No. 15,623.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK J. ANDREWS, et al.,
Defendants-Appellants.

ORDER.

Before: MILLER, CECIL and EDWARDS, *Circuit Judges.*

Petitions for rehearing having been received and considered by the court in the above-styled appeal,

IT IS HEREBY ORDERED that said petitions be DENIED.

Entered by order of the court:

/s/ CARL W. REUSS,
Clerk.

Office-Supreme Court, U.S.
FILED
OCT 2 9 1965
JOHN F. DAVIS, CLERK

No. [redacted] 707

In the

SUPREME COURT OF THE UNITED STATES

[redacted]

October Term, 1965

WALTER OWENS and RUSSELL A. MALONE,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WALTER OWENS, Pro Se,
Petitioner
3966 Standish Avenue,
Cincinnati, Ohio 45213

RUSSELL A. MALONE, Pro Se,
Petitioner
3547 Harvey Avenue,
Cincinnati, Ohio 45229

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

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In the

Supreme Court of the United States

October Term, 1965

No. 607

WALTER OWENS and RUSSELL A. MALONE,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Walter Owens and Russell A. Malone, each file this petition Pro Se, and each prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on June 17, 1965.

OPINION BELOW

The opinion of the court below (Appendix B, infra, pp. 6A-23A) is reported in 347 F. 2d 207.

JURISDICTION

The judgment of the court below (Appendix C, infra, p. 24A) was entered on June 17, 1965. A timely petition for rehearing was denied on August 30, 1965 (Appendix D, infra, p. 25A). The jurisdiction of this Court is invoked under 28 U.S.C. No. 1254(1).

QUESTIONS PRESENTED

1. Whether, where newspaper accounts obviously prejudicial to the co-defendant (Frank J. Andrews) of these petitioners were likewise prejudicial to these petitioners, and where the newspaper accounts were published in the course of a trial lasting 18 court days that were followed by three and a half days of jury deliberation, was it proper for the trial judge to deny the request made in respect to each publication that the members of the jury be examined on voir dire to ascertain whether they had seen the articles in question.

2. Whether the trial judge's charge was improperly coercive under the doctrine of *Jenkins* v. *United States,* 380 U. S. 445, particularly when it was repeated after the jury had already deliberated for three days.

3. Whether the instruction to the jury on reasonable doubt, wherein the trial court also stated "it is not an excuse not to make a verdict," was prejudicially erroneous.

4. Whether the entire charge to the jury on willfulness was prejudicially erroneous.

5. Whether it was prejudicial error for the trial court to permit the prosecuting attorney in the presence of the jury after the witness for the government had invoked his privilege against self-incrimination to ask questions which he knew the witness would refuse to answer on the grounds of self-incrimination.

6. Whether, as to petitioners Walter Owens and Russell A. Malone there was any evidence at all, to justify the overruling of their Motion for a Judgment for Acquittal.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are set forth in Appendix A, infra, pp. 1A-2A.

STATEMENT

This petition is filed Pro Se by each of the petitioners Walter Owens and Russell A. Malone.

Only one petition was filed because petitioners are without funds to print separate petitions, and without funds to engage and retain counsel. This petition was prepared for petitioners by counsel who represented them in the trial of the case below, but who received slight remuneration from Walter Owens, and no remuneration from Russell A. Malone. Such counsel received no remuneration whatsoever for any services rendered by him in the United States Court of Appeals for the Sixth Circuit on the original appeal, or on the petition for a rehearing. He has since withdrawn as counsel for these petitioners, but in order that their appeals not go by default, he prepared this Petition for a Writ of Certiorari for which he has received no recompense.

Although the Petition is a joint petition, it is respectfully pointed out and submitted that the evidence as to petitioner Walter Owens is totally different than the evidence as to petitioner Frank J. Andrews (in Case No. 607), and is totally different than the evidence as to petitioner Russell A. Malone.

A. The Indictment

Petitioners, Walter Owens and Russell A. Malone, together with Louis Tye, Frank D. Andriola, Russell A. Ma-

lone, Peter A. Andrews, Jr., Frank J. Andrews, Willard Whitley, and Gus Postell (8 in number. There was a ninth — one Daniel Andrews, but he was severed from the case because of a heart condition, and was never tried), were indicted in a 35 count indictment (2273a-2306a).

Count 1 is a conspiracy count. 18 U.S.C. 371; 26 U.S.C. 7201; 26 U.S.C. 7206(1); 26 U.S.C. 7206(2); Sections 4401, 4411 and 4412 Internal Revenue Code of 1954.

Counts 2 through 32 are substantive counts which allege in essence wagers made and excise taxes allegedly due thereon for the months July, 1961, and in inverse order back through February, 1959. 26 U.S.C. 4401; 26 U.S.C. 4421.

Count 33 is a count charging unlawful use of telephone facilities. 47 U.S.C. Section 203 (c) (3).

Count 34 charges failure to pay the special occupational tax required by persons receiving wagers. 26 U.S.C. Section 4411 and 7203.

Count 35 charges failure to register by persons required to pay the special occupational tax. 26 U.S.C. Section 4412 and 7203.

Petitioner Walter Owens was indicted on all counts, except counts 34 and 35. He was convicted on all such counts and was sentenced to 5 years and a $10,000.00 fine, to run concurrently.

Petitioner Russell A. Malone was indicted on count 1 (conspiracy), and counts 34 and 35 (failure to pay special occupational tax and to register). He was found guilty on each such counts, and was sentenced to 5 years plus a $10,000.00 fine on count 1, and 1 year on each of counts 34 and 35, all to run concurrently.

B. The Evidence

On February 2, 1959, Frank J. Andrews leased the premises which he owned at 330 Central Avenue, Newport, Kentucky, to a partnership consisting of Daniel Andrews (who was severed from the case because of inability to be present at the trial due to a heart condition), petitioner Walter Owens, and Willard Whitley (who is also filing a Petition for a Writ of Certiorari). The partnership openly conducted wagering operations on the premises. The gaming for the purpose of this case consisted of playing what is known as the "numbers" game, and was divided into day numbers and night numbers. The partnership paid the tax on the day numbers; it did not pay the tax on the night numbers, claiming it was exempt under 26 U.S.C. Section 4421(C) (A). The partners and those of their employees coming under the provisions of wagering laws were duly registered as required by the wagering tax provisions of the Internal Revenue Code (Govt. Ex 1-121).

Petitioner **RUSSELL A. MALONE** acted as independent agent. He took bets on his own on the Sportsman's Club lot (302a, 303a). They were for night numbers (369a, 341a), on which he collected no 10% tax (285a), because all persons concerned with night numbers were of the opinion that "night" numbers were not within the purview of the law, and were exempt therefrom because of the nature of the operation. (285a, 2155a, 2156a). Thus no knowledge or intent to commit an unlawful act could be shown or inferred. He was not an employee of the partnership or club. (2153a, 2154a). He secured his recompense by securing bets from customers, and turning in 75% of the bet, retaining 25% for himself, which was the customary practice. (239a). His activities are set forth in the

record on pages 269a, 272a, 277a, 278a, 285a, 286a, 287a, 302a, 303a, 304a, 306a, 307a, 308a, 312a, 314a, 317a, 319a, 320a, 322a, 323a, 324a, 325a, 326a, 336a, 341a, 345a, 347a, 358a, 359a, 360a, 361a, 362a, 363a, 368a, 372a, 373a, 576a, 940a, 1026a, 1055a, 1782a, 1786a, 1787a, 1789a, 1792a, 1794a, 2011a, 2153a, and 2154a. Nothing in the record sustains a conspiracy on his part under count 1, nor a conviction under counts 34 and 35 for failure to pay the special occupational tax or to register.

C. Vital Occurrences at the Trial

1. *The Prejudicial Newspaper Publicity.*

The prejudicial publicity carried by the local newspapers, covering the city in which the trial was being conducted, and in the entire area from which the members of the jury lived, although directed against Frank J. Andrews, co-defendant on trial of these petitioners, was detrimental and prejudicial to each and all of these petitioners.

On no less than nine occasions during the trial, there was brought to the attention of the court newspaper headlines and articles, alleged to be prejudicial, some of them referring to matters that had been excluded (354a, 483a, 654a, 1249a, 1390a, 1460a-1461a, 1995a-1996a, 2077a-2078a, 2136a-2137a, 2256a-2259a). In each instance counsel requested that the members of the jury be examined on *voir dire* to ascertain whether they had seen the articles in question, and in each instance the judge refused the request, saying on the first few of these occasions that he would not assume that the jurors would not heed his admonition not to read about the case in the newspapers (354a-356a, 483a-484a).

The jury was not locked up either during the trial or during the three nights that intervened from the beginning to the close of its deliberations.

The prejudicial newspaper publicity was as follows:

(a) On July 2, the trial court sustained an objection to the prosecution's showing that the numbers game on the 333 Central Avenue premises was rigged (290a-293a), the court saying, "It's highly inflammatory and just to show they are running a crooked game, if that's the only purpose for it, which has nothing to do with what they owe the Government on the tax" (293a).

Next morning, a headline on the front page of *The Cincinnati Enquirer*, Kentucky Edition, read, "U. S. Stopped From Showing Numbers Selection 'Rigged'" (Def. Ex. X).

(b) On Wednesday, July 4, the banner headline on *The Kentucky Post and Times Star* proclaimed "Gaming Club's 'Secrets' Bared" (Def. Ex. X-1). The trial judge admitted (483a) that "it is a rather glaring headline," but again denied the motion to examine the jurors on *voir dire* because he would not "have the jury catechized every morning before we start court to see whether or not they have violated their oath and violated their obligations as jurors to observe the court's instructions, simply because the newspapers are writing up this case" (484a).

(c) On July 6, *The Cincinnati Enquirer*, Kentucky Edition, had on its front page a picture of Mary Jo Williams, who had testified at length on the preceding day (582a-635a), with a caption "Widow Terrified, Denies Andrews' Story" (Def. Ex. X-2). A renewed motion for a *voir dire* examination of the jury was denied for the reasons theretofore given (654a).

(d) The same paper's story on July 11 headed, "Andrews' Huge Deposits Shown," was the subject of another motion for *voir dire* examination, which was denied (1249a).

(e) A similar motion was made and denied on the following day (1390a) in respect of the July 11 edition of the *Kentucky Post and Times Star* (Def. Ex. X-3-0), which had first page headlines reading "Say Checks For Andrews On Numbers. Deposited to Personal Account, Witness Testifies."

(f) Later on the same day an identical motion was made and denied (1460a-1461a) in connection with the same paper's issue of July 12 (Def. Ex. X-3), the first page of which had a story headed "Aide Links Andrews With Club" that continued at length on p. 22.

(g) The motion for similar questioning of the jury was again denied a few days later (1995a-1996a); on that occasion the basis for the motion was a headline in *The Kentucky Post and Times Star* of July 17 reading "Unwilling Witness Tells of Phone Call" (Def. Ex. X-5), and one in the July 18 issue reading, "Government Near End in Racket Case" (Def. Ex. X-6). When counsel was asked by the court whether he was able to represent that the jurors had in fact violated the court's admonitions, he replied (1996a), "No, I do not know that. It would only be determined after we inquired on *voir dire*."

(h) On the following day, counsel complained of a *Cincinnati Enquirer* headline reading "U. S. Plays Trump Card in Andrews Tax Evasion Trial" (Def. Ex. X-7), saying (2077a), "* * * we suggest to the Court no one heard of this language before in the courtroom, that it is a news editorial and prejudicial to these defendants, and for those reasons we move to inquire as to whether the jurors

have read this paper, heard any similar radio news account or telecast account." Once more the motion was overruled (2078a).

(i) Later on the same day, a further motion for examination of the jurors was made in respect to a *Kentucky Post* headline dated July 19, with a banner first page headline reading "Recess Seen in Numbers Trial" (Def. Ex. X-9), the text of which set forth Andrews contention that he was only a landlord after asserting that some of the papers seized by raiding Internal Revenue agents were identified by a handwriting expert as bearing his name (2136a-2137a); "If any of the jurors have read that, we believe that misstatement by the paper would be highly prejudicial to the rights of my defendant." Once more, "for the same reasons," motion overruled (2137a).

2. *The Charge as to Hung Juries and the Duty of a Jury to Reach Agreement.*

The judge's charge in chief extends to 55 pages of the transcript (2178a-2224a). On the second page he said:

> "We have in this country I am afraid all too frequently what is known as hung juries, when the jurors are unable to agree. While, of course, the purpose of the jury trial is that it would be tried by men of varying degrees of experience and yet they are men who are supposedly capable of making up their minds on a given set of facts. All too frequently we have, I say, what is known as a hung jury which is no credit to the individual juror or to the jury itself or to the system or to the Court. I suppose that if there would be enough hung juries we would probably abolish the jury system for there has to be something to be progressive in the administration of justice and not a stumbling block." (2179a).

In the course of defining reasonable doubt, he charged:

"The term *reasonable doubt,* as used in this instruction, is best defined by a use of the term itself. Don't be confused by reasonable doubt. It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror" (2184a).

The judge further charged (2185a-2187a).

"But before you make up your mind, gentlemen, you should give due regard and consideration to the reasoning and recollection and understanding of your fellow jurors. I am confident that every man on that jury, possibly none of you have ever known each other before you served together on this jury, but let me assure you that each man on that jury is just as anxious to do the right and proper thing in this case as you are. And before you make up your verdict, and I firmly believe that, before you make up your verdict or make up your mind what the verdict should be, you should give due regard to the reasoning and recollection, arguments, of your fellow jurors.

"A reasonable man is an awfully good kind of a citizen. I know there are those who have won fame by being stubborn and hardheaded. Somehow or other, I think the man that really keeps things going in this world is the reasonable man, the man who is willing to give and take, who is willing to accede that the other fellow's views might, after all, not be entirely non-sensical.

* * *

"I have never served on a jury, but I have known a lot of people who have and I have been told that you go to a jury room and some one or two or more of the

jurors immediately announce what the verdict will be and that they will stay there all day or all night or some other such extravagant statement, mistaking I am afraid hardheadedness and stubbornness with strong-mindedness. Well, such a person is not a good juror, not a good citizen, because he doesn't understand the meaning of an oath. Your oath carries through on that as it does on other things. So I ask you when you go to your jury room to see if you can make up your mind and make a verdict in this case. If you can't, you can't and I wouldn't undertake to require you to make a verdict. I couldn't if I wanted to and I wouldn't if I could. That is your free prerogative, but I do want you to understand that it is a responsibility which should not be lightly shirked. It is very easy to get into the jury room and not too concerned, 'Oh, well, let's let some other jury decide it. We just won't make any verdict.' I hope you won't take that attitude and I have every confidence that you won't."

This was on the morning of July 25, a Wednesday.

On the afternoon of Saturday, July 28, the Court of its own motion told the jury (2262a-2263a):

"The case was finally submitted to you, as I recall, about 1:00 o'clock on Wednesday and here it is Saturday afternoon and the case does not, could not, it would seem to me, require nearly that much time to decide. I don't know whether you are assuming a responsibility that makes you feel you have to examine each bit of evidence by way of exhibit, in other words, whether you can't see the woods for the trees. This case has covered—this is the end of five weeks trial and we had four weeks of testimony and two days, I might say, of argument. It would be practically impossible to expect the jury to take up every conceivable bit of evidence by way of exhibit that has been offered in this case, but to look at the whole case, examine the whole

thing as a whole as I tried to outline to you, draw what reasonable inferences may be drawn from the case. The exhibits are a part of the evidence, an important part of the evidence, but they are not all of the evidence. And I am going to ask you to resume your deliberations, taking into consideration that many of these counts in this indictment are very similar. It would seem that if a person were guilty or not guilty of one, the same thing would apply to many of the others. You have eight defendants here."

The next to last sentence quoted was objected to, without avail (2264a-2265a).

3. *The Charge on Reasonable Doubt.*

In addition to, and immediately following the reference to reasonable doubt previously quoted (*supra*, p. 10) the district court instructed the jury:

> "But I think as common sense men of everyday affairs, you do understand the difference between what is reasonable and what is unreasonable, and so this term reasonable doubt means just what it says. It is a doubt based upon reason, not some inconsequential doubt that might flit through the mind of a juror, not some slight mental hesitation that might guide you in determining the less significant affairs of everyday life; but a doubt for which there is a reason, such a doubt as would guide you in determining the course of action in the conduct of your ordinary everyday living; a doubt based upon reason, not some shadowy, inconsequential misgiving." (2184a)

4. *The Charge on Intent.*

In his charge, the trial judge told the jury (2180a) that "this is a tax evasion case," and a little later said (2182a):

"Your question is simple and narrow: Did they pay the taxes due under the law? * * * Your business is this: Did they pay the taxes under the law?"

Despite appellant's Request for Charge No. 6 (2163a-2164a), the district court instructed the jury as follows:

"You will notice when I refer to this indictment a little later that it charges that these defendants did 'willfully and knowingly' do certain things. 'Willfully, and knowingly' implies what went on in their minds. This is offense which requires a criminal intent and therefore you must find, before you can find these defendants or any of them guilty, that they intended, that they committed a violation of the law intentionally. The question of intent is always somewhat confusing unless we look at it rationally and rationalize about it. So far, science has never reached the place where you can take some sort of an instrument and look into a man's head or into his brain and see what he is thinking. That is not visible; though, after all, is not a substance, it is not a mass. The brain is a mass, but the thought is not. What you may intend to do is not reflected in any of your physical parts or what you are thinking is not reflected in any of your physical parts. And so the law is bound then to accept the next best text and that is that a person is presumed to intend the natural consequences of his own deliberate acts. And you have to judge what is in his mind by what he does and the reasonable inferences which may be drawn from it. The United States is not required to produce someone here to establish beyond a reasonable doubt just what these defendants had in their minds at all stages of this alleged offense, but it shows by evidence and introduces witnesses and examines these witnesses in your presence and for your benefit and subject to cross-examination by the defendants, to bring out the facts and then you, from

those facts, are to determine whether or not these defendants or any of them or all of them intended to defeat the tax collector in his efforts to receive from them the amount of taxes which the United States says were due. So, you are not to be confused by that thing intent. That, again, is not something to hide behind to keep from making a verdict. You reach that fact as you would any other fact. A person intends, under the law the natural consequences of his own deliberate acts and you have a right to determine that question of intent by the whole evidence in the case and by the actions and conduct of the defendants." (2190a-2192a)

Objection was specifically made that the charge did not include willfulness as an essential element as follows:

"In the first portion of your charge to the jury, you made the statement that the issue is narrow and simple, it is a tax evasion case and a few moments later you said the question is, did they pay the taxes due under the law, and while Your Honor did charge the jury that it must be knowingly, willfully and unlawfully, I believe that Your Honor gave undue emphasis to the fact that the only question is did they pay taxes due under the law. I think also of equal importance and maybe of greater importance is the fact that did they do it unlawfully willfully and knowingly, and I ask the Court to perhaps correct to the jury the misapprehension that the only question offered is, did they pay the taxes due under the law." (2229a-2230a)

This objection was overruled (2230a).

On the morning of Friday July 27, after a day and a half of deliberation, the jury asked for further instructions on the conspiracy charge, count 1 (2245a).

Following some three pages of explanation (2245a-2248a), counsel for this appellant requested clarification—

"you said the mere fact that he knew that there was an illegal operation there would make him guilty" (2249a)—the Court further charged as follows:

> "Bear in mind, as I have emphasized, the day before yesterday in my charge, the charge here is the withholding of this excise tax, that is the offense charged, and the knowledge which is set forth in the charge is knowledge that the tax purposes were being defeated and that the government was being defrauded of its taxes. That is the charge contained in the indictment. *As I told you, it is a narrow proposition. Did they account for the tax or did they not,* and if they didn't, who was responsible or who participated in it under the general rule I have given you, under the law of conspiracy." (2250a-2251a, emphasis supplied.)

Again there was objection and again it was overruled; the colloquy was in these terms (2252a):

> "MR. WEINTRAUB: Your Honor again said to the jury, just a moment ago, that the issue is narrowed down to one thing, did they pay the taxes. Now, I think in view of that statement, you ought to tell them that it is not only that, but did they wilfully fail to pay, because when you tell the jury that the only question is—it is not only did they fail to pay the taxes——
>
> THE COURT: I think I have covered that all sufficiently.
>
> MR. WEINTRAUB: Well, I think you leave them with the issue is, did they fail to pay the taxes. It isn't only that but did they wilfully and deliberately fail to do it.
>
> THE COURT: Overruled. I have covered that repeatedly."

5. *Questions Concerning Prior Grand Jury Testimony Put to Witness Who Had Invoked Privilege Against Self-Incrimination.*

A witness, Joseph Harris (1648a-1666a) testified to a conversation with Frank Andrews in June or July 1959 in which the latter inquired whether Harris would be interested in the Copa Club at 333 Central Avenue (1649a-1651a). Harris testified that there was no reference in that conversation to the numbers business at the Copa Club (1653a). Thereupon, in response to further questions, he admitted having testified before the grand jury (1653a, 1656a). He was then read an answer purportedly given by him before that body (1656a), in which he quoted the appellant as saying, *inter alia,* "I don't need the Copa Club, I got the numbers going for me," and also "he said there was no numbers involved, so all I want you to do is to book the shows and operate the club and so forth."

Motion for a mistrial was made and overruled (1656a-1657a), and in a colloquy, the defense's request for the grand jury minutes from which the prosecution was reading was denied (1657a-1661a).

Following an admonition by the court that the prosecution's question was not to be considered as any evidence against the defendants (1662a), the witness' previous grand jury answer was again read to him; he claimed the privilege against self-incrimination (1663a, 1665a). Objection to another question based on a grand jury answer was sustained because non-contradictory (1663-1664a). The prosecution recurred to a further grand jury answer that had this petitioner saying to the witness that if the witness "would go back to the bottoms they would put together this numbers racket and consolidate it into one racket," again there was objection, again the witness invoked privilege,

and again a motion for mistrial was made and overruled, the court simply repeating the admonition that the questions were not evidence against the defendants (1664a-1665a).

Once more the witness was read one of his grand jury answers concerning his suggesting the name of one Holtzman to this petitioner to take over the Copa Club, "so I called Mr. Holtzman and he talked to Mr. Andrews and it was only a matter of a few days until Mr. Holtzman was working, running the club for Mr. Andrews;" objection was sustained, and a motion for mistrial was denied (1665a-1666a).

D. The Opinion Below.

On appeal, the court below affirmed, largely in reliance, so far as the question of adverse newspaper publicity was concerned, on its own recent decision in *Sheppard* v. *Maxwell,* 346 F. 2d 707, pending on petition for certiorari, No. 490, this Term. It relied on the fact that the present case was less flagrant than that one; that here there had been no motion for change of venue; and that the case was factually different from its own earlier decisions in *Briggs* v. *United States,* 221 F. 2d 636; *Marson* v. *United States,* 203 F. 2d 904; and *Stone* v. *United States,* 113 F. 2d 70.

It criticized the trial judge's charge, saying (*infra,* Appendix B, p. 14A):

> "Referring to reasonable doubt he said: 'It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror.' We do not believe that this language is desirable. While it may be argued that this simply tells the jury that it is not any captious doubt which should cause them to withhold a verdict if

> otherwise convinced, it seems to us to place the Court in the position of urging a verdict with more emphasis than is appropriate."

But, taking the charge as a whole, the court below concluded that petitioners were not prejudiced.

As to the other issues that were presented by petitioners the court found no reversible error citing Rule 52(a) Fed. R. Crim. P.; 28 U.S.C. § 2111.

REASONS FOR GRANTING THE WRIT.

First. The ruling sought to be reviewed represents, so far as we are aware, the first decision by a Federal appellate court holding that, after plainly prejudicial newspaper articles concerning the trial that appear during the trial are called to the trial judge's attention, he may refuse requests to question the jury whether they have seen the articles, simply because the jurors had previously been admonished, in generalized terms, not to read any newspapers. Such a holding turns the presumption that jurors will heed the instructions given them into one that is conclusive, i.e., into a rule of law. But every other circuit that has ever considered the question, including the court below in earlier cases, has held that the rule is precisely to the contrary.

1. By way of preliminary, we note that the trial judge never once undertook to rule that the newspaper accounts would not have been prejudicial if all of the jurors had read them.

No such ruling, very plainly, would have been justified by this record. For here the newspaper headlines set forth matters that the court had advisedly withheld from the jury, viz., "U. S. Stopped From Showing Numbers Selection 'Rigged'" (Def. Ex. X), this after the trial judge had

declared such evidence "highly inflammatory" (293a). The same article characterized petitioner as "master controller" of a gigantic numbers operation out of Newport after the trial judge had ordered the jury not to consider an answer, given in response to a leading question, that the witness had heard several people call petitioner the "Big Man" or the "Boss" (609a-610a). In another instance, the offending publicity was expressed in terms that exuded prejudgment of guilt, viz., "King of the Numbers Racket" (354a). Indeed, as the trial judge himself recognized (483a), some of the headlines were "glaring."

It is therefore no answer to say that the publicity in the Dr. Sam Sheppard case was a more shocking instance of journalistic incursions on the basic right to a fair trial; that case, whatever its ultimate outcome—as noted, it is now pending here as No. 490—is wholly different in two respects. First, it was a collateral attack on a State court judgment ten years later, not direct review of an original Federal conviction as here; second, even in the *Sheppard* case, the trial judge did question the jurors whether they had heard a particularly offensive broadcast. 346 F. 2d at 751.

2. The real vice here is that the trial judge refused to make the inquiry that the court below had earlier held was required (*Marson* v. *United States,* 203 F. 2d 904, 911): "Upon the showing of appellant's counsel, it was the duty of the court to interrogate the members of the jury to ascertain whether they had seen the newspaper articles and, if so, whether it had created any prejudice in their minds."

Other circuits, without exception, have uniformly enforced the duty of making inquiry on request.

Representative decisions include *Coppedge* v. *United*

States, 272 F. 2d 504 (C. A. D. C.), where the court held inadequate a very generalized inquiry; *United States* v. *Bentvena,* 319 F. 2d 916, 934 (C. A. 2), where a juror who was shown the offending account by his wife but refused to discuss it with her was none the less discharged from the jury; *United States* v. *Vita,* 294 F. 2d 524 (C. A. 2), certiorari denied, 369 U. S. 823, where a juror who admitted reading the prejudicial article was excused and an alternate substituted; *United States* v. *Carlucci,* 288 F. 2d 691, 694-695 (C. A. 3), certiorari denied, 366 U. S. 961, where the judge "meticulously questioned" every juror; *United States* v. *Milanovich,* 303 F. 2d 626, 629-630 (C. A. 4), certiorari denied, 371 U. S. 876, where the court of appeals emphasized the duty of the trial judge to determine whether the prejudicial matter had reached any juror; and *Accardo* v. *United States,* 298 F. 2d 133, 136 (C. A. 7), where the court said that the district judge "should have, by the careful examination of each juror, out of the presence of the others, determined the effect of the articles on those who had read them and whether they had discussed the articles with others." In that case, the Seventh Circuit said, in language fully applicable here, that (298 F. 2d at 136) "The judge's general admonitions at the beginning of the jury selection, his assumption of their effectiveness, and his instructions, were inadequate protection."[1]

Estes v. *United States,* 335 F. 2d 609, certiorari denied,

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[1] In numerous other cases involving prejudicial newspaper publicity, the reports show that the trial judge in fact inquired whether the offending articles had been read by the jury. E.g., *United States* v. *Agueci,* 310 F. 2d 817, 831-832 (C. A. 2), certiorari denied, 372 U. S. 959; *Cohen* v. *United States,* 297 F. 2d 760, 763-764 (C. A. 9), certiorari denied, 369 U. S. 865; *United States* v. *LaBarbera,* 273 F. 2d 547 (C. A. 2); *United States* v. *Carruthers,* 152 F. 2d 512 (C. A. 7) certiorari denied, 327 U. S. 787; *Itow* v. *United States,* 223 Fed. 25, 28 (C. A. 9).

379 U. S. 964, cited—and apparently relied on—by the court below, was wholly different; there no request for inquiries directed to the jurors was made until after the close of the evidence. Here, to the contrary, such a request was made on each occasion that the prejudicial material appeared.

Except for the ruling now sought to be reviewed, we know of no appellate decision approving the denial of a motion for *voir dire* examination of the jury to ascertain whether any jurors had in fact seen the prejudicial publicity. The unanimity with which Federal trial judges throughout the land have made such inquiries even without express request once the existence of improper newspaper comment is made manifest demonstrates that, by the consensus of judicial opinion, a generalized admonition not to read about the case in the newspapers is deemed wholly insufficient once the prejudicial accounts have in fact appeared.

The present case, therefore, which takes a wholly different approach in a situation that recurs again and again, is in clear conflict with decisions of courts in other circuits and accordingly calls for further scrutiny here.

3. We mention, simply to show that it has not been overlooked, the suggestion of the court below that Andrews did not move for a change of venue. The short and indeed conclusive answer to this notion was given by the First Circuit in *Delaney* v. *United States*, 199 F. 2d 107, 116:

> "The right to apply for a change of venue is given for the defendant's benefit and at his option. He is not obliged to forego his constitutional right to an impartial trial in the district wherein the offense is alleged to have been committed."

Second. We think the judge's charge here, particularly the portion thereof given on the fourth day of the jury's deliberation (2262a-2263a; *supra,* p. 11)—a portion, significantly enough, nowhere included in Appendix D to the opinion below (*infra,* pp. 22A-23A)—was improperly coercive within this Court's recent decision in *Jenkins* v. *United States,* 380 U. S. 445, reversing 330 F. 2d 220 (D. C. Cir.).

1. By way of preliminary, we note that the charge-as-a-whole doctrine, that venerable catch-all for sweeping under the judicial rug every inconvenient error committed at the trial, which the majority of the District of Columbia Circuit had relied on in the *Jenkins case* (330 F. 2d at 220-221), but to no avail, is subject to a logical difficulty, viz., that "We cannot speculate as to which part would be accepted by the jury * * *." *Price* v. *United States,* 200 F. 2d 652, 655 (C. A. 5).

Thus, here, the language that the court below deemed "not * * * desirable," because "it seems to us to place the Court in the position of urging a verdict with more emphasis than is appropriate," was considered cured by "the totality of the Judge's charge on reasonable doubt." But, to put the Fifth's Circuit language in the form of a question, "Which part would be accepted by the jury?"

2. Here the coercive aspect permeated the entire charge, and was moreover emphasized by being repeated after the jury had by over three days of deliberation demonstrated its inability to arrive at a verdict without coercion.

A. The trial judge early set up the hung jury as an ogre, and expressly—but quite improperly—told the jurors that a hung jury is discreditable to the individual jurors

and to the jury, even to the extent of destroying the jury system (2179a, 2185a-2187a; *supra,* pp. 9-11). The law, of course, is quite otherwise; "a mistrial is as much a part of the jury system as a unanimous verdict." *Williams* v. *United States,* 338 F. 2d 530, 533 (C. A. D. C.).

Next, the trial judge told the jury, as to two essential elements of the offense, that they were not "an excuse not to make a verdict" (2184a) and "not something to hide behind to keep from making a verdict" (2192a). The trial judge encouraged compromise, approving "give and take" (2185a), and condemning firmness (2185a-2186a). Indeed, the trial judge said that a juror who remained steadfast was "not a good juror" and "not a good citizen" because "he doesn't understand the meaning of an oath" (2186a). Yet even the notorious *Allen* or "dynamite" charge (*Allen* v. *United States,* 164 U. S. 492, 501), which has yet to be condemned in its pristine form, constitutes reversible error when it fails to contain the qualification that if any individual juror still retains his views, he is not to yield his judgment simply because he is outnumbered. *United States* v. *Rogers,* 389 F. 2d 433, 434, 437 (C. A. 4); *Powell* v. *United States,* 297 F. 2d 318 (C. A. 5); *Green* v. *United States,* 307 F. 2d 852 (C. A. 5).

No such qualification was contained in the charge given here, before the jury retired (2179a, 2185a-2187a), yet the court below held the charge cured by the trial court's abstractions concerning reasonable doubt.

B. But, bad as the charge was originally, its prejudicial content was compounded by the additional charge given after the jury had deliberated unsuccessfully for over three days. At that point, the trial court pressed hard for a verdict, calling attention to the lapse of time, and

finally saying to the jury it did not need to examine all the evidence (2262a-2263a):

> "And I am going to ask you to resume your deliberations, taking into consideration that many of these counts in this indictment are very similar. It would seem that if a person were guilty or not guilty of one, the same thing would apply to many of the others."

At 1:15 P.M. on July 28, 1962, shortly after which the jury returned with a verdict, the trial judge addressed the jury (2264a):

> THE COURT: Members of the jury, of course it is not the function of the court to inquire into your deliberations. That is a matter which addresses itself entirely to you. However *I think it is proper to remind you that you have been considering this case for some* 19 *hours and it seems to the Court that it is a matter which could have been determined in much less time than that,* unless you have some misapprehension or some misunderstanding of just what your consideration of the case should be. I don't want you to make any revelation of any ultimate decisions you may have made, but if you feel the Court can throw any enlightenment upon the case and enable you to conclude your work and reach a decision in the case, I would be glad to do so. I don't know just how you are approaching this decision. The question is whether or not these defendants, each of them, are guilty as charged in this indictment. That means consider all of the evidence, not just the exhibits, but all of the evidence in the case, all reasonable inferences which may be drawn from it. And if there is any way in which the Court might be of assistance or enlightenment or clear up any points, I would be glad to do it. *The case was finally submitted to you, as I recall, about 1 o'clock on Wednesday and here it is Saturday afternoon and the case does not, could not,*

it would seem to me, require nearly that much time to decide. I don't know whether you are assuming a responsibility that makes you feel you have to examine each bit of evidence by way of exhibit, in other words, whether you can't see the woods for the trees. This case has covered — *this is the end of five weeks trial* and *we had four weeks of testimony* and two days, I might say, of argument. It would be practically impossible to expect the jury to take up every conceivable bit of evidence by way of exhibit that has been offered in this case, but to look at the whole case, examine the whole thing as a whole as I tried to outline to you, draw what reasonable inferences may be drawn from the case. The exhibits are a part of the evidence, an important part of the evidence, but they are not all of the evidence. And I am going to ask you to resume your deliberations, taking into consideration that many of these counts in this indictment are very similar. *It would seem that if a person were guilty or not guilty of one, the same thing would apply to many of the others.* You have eight defendants here. When I say you consider each defendant separately, that is the law and that is what I want you to do, but take up each defendant and determine whether or not from the whole case and all the evidence, that defendant has been proven guilty in the meaning of the law to the exclusion of a reasonable doubt.

I do not wish to intrude upon your deliberations or your plan of arriving at a verdict, but *it is of great concern that the matter that has been submitted to the jury should just go on apparently indefinitely.* There are many hazards which you must recognize give the Court some great concern. If one of the jurors should become ill, all this five weeks' work would go for nothing and it is definitely important that you do reach a decision after due and careful deliberation, but it should be approached in such a way that it would not ignore the ultimate point of taking the case as

a whole, the whole case as it relates to each of the defendants, and as to each count.

If you feel there is anything that the Court might — any question which the Court could discuss further, be of any assistance to you or do you just want more time? You don't think there is?

THE FOREMAN: I don't know of anything at the present time to bring up.

THE COURT: Well, I'm going to let the jury retire for further consideration of the case. Hand them the indictment, Mr. Marshal, and let the jury retire to the jury room.

Objection proved fruitless (2264a-2265a); the law that such a charge was improper was ignored (*Blunt* v. *United States*, 244 F.2d 355, 367-368 (C.A. D.C.)); and the impact of the erroneous instruction was magnified because it came on the fourth day of the jury's deliberations. For, as this Court said in *Bollenbach* v. *United States*, 326 U.S. 607, 612:

> "Particularly in a criminal case, the trial judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

In context, therefore, the charge as supplemented was plainly and erroneously coercive. *Jenkins* v. *United States*, 380 U.S. 445.

Third. In this country a defendant must be given the benefit of a reasonable doubt. A reasonable doubt is "an excuse" to render a verdict of not guilty. The instruction given on reasonable doubt would prevent a jury from bringing a verdict of not guilty because they had a reasonable doubt. And when the trial court stated "So that term

reasonable doubt is used in the sense which I have undertaken here to define it to you," (*infra*, p. 23A), the petitioner was indeed gravely prejudiced. The court had stated to the jury that "It is very easy for a person in his own mind to say, 'Well, true, I have a reasonable doubt.'" (*infra*, p. 22A). If the evidence in a case is such that it is "very easy" for a juror to have a reasonable doubt there should be a verdict of not guilty. The district court instructed the jury that they should not "be confused by reasonable doubt." We submit the jury had to be confused.

Further, the instruction on reasonable doubt was fundamentally erroneous, since it reduced the content of the term to "such a doubt as would guide you in determining the course of action in the conduct of your everyday affairs." As such, it is obviously inconsistent with the philosophy expressed by this Court in *Holland* v. *United States*, 348 U.S. 121, 140; see also *United States* v. *Heap*, 345 F.2d 170 (C. A. 2); *Scurry* v. *United States*, 347 F.2d 468, 469-470 (C. A. D. C.).

With these words fresh in their ears, the jury retired and after a short interval returned the verdict of guilty against the petitioner.

Fourth. In *Ingram* v. *United States*, 360 U.S. 672, which, like the present appeal, involved a conviction for violating 18 U.S.C. § 371 by conspiring to evade the payment of the wagering tax, the Supreme Court said (360 U.S. at 678):

> "'[C]onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself.' [Footnote 9 omitted.] The substantive offense which Smith and Law were accused of conspiring to commit was the willful evasion of federal taxes, an

> offense which, even presuming knowledge of the tax law, obviously cannot be committed in the absence of knowledge of willfulness. *Spies* v. *United States, supra. Cf. United States* v. *Falcone,* 311 U.S. 205."

The necessary result of the direction that "a person is presumed to intend the natural consequences of his own deliberate acts" was to create a presumption of specific intent inconsistent with the presumption of innocence. *Morissette* v. *United States,* 342 U.S. 246, 273. As there held, such a statement has no proper place in a charge relating to a criminal offense where specific intent and bad purpose are essential elements. Such instruction is condemned as fundamentally prejudicial. *Mann* v. *United States,* 319 F.2d 404, 407, 410 (C.A. 5); *Chappell* v. *United States,* 270 F.2d 274 (C.A. 9); *Block* v. *United States,* 221 F.2d 786, 788-789 (C.A. 9).

And in his further instructions, given after the jury had requested clarification following deliberations for a day and a half, the trial judge not only failed to mention intent, but rejected the suggestion that he do so.

The heart of the supplementary instruction (2251a) was, "As I told you, it is a narrow proposition. Did they account for the tax or did they not," and the heart of the objection (2252a) was, "I think you leave them with the issue is (sic), did they fail to pay the taxes. It isn't only that but did they willfully and deliberately fail to do it."

Yet at this critical juncture, the court overruled the objection (2252a), and left the case to an obviously troubled jury as a problem in arithmetic, viz., whether the full 10% tax that the United States levies on gambling enterprises had been paid.

Since willfulness is an essential ingredient of the offense of conspiracy of which this petitioner was convicted, and since at a critical juncture of the proceedings the case was left with the jury under instructions that omitted all mention of willfulness, reversal for a new trial is required.

Fifth. The witness James Harris was sought to be impeached, in respect of his denial that his conversation with this appellant had referred to the numbers business at the Copa Club, by means of an allegedly prior contradictory statement before the grand jury (1653a, 1655a-1656a). But in that statement, the appellant according to the witness had carefully differentiated between the Copa Club and the numbers business (1656a-1657a); the statement was therefore not contradictory.

When the answer was read again, the witness invoked privilege, and did so with respect to several other prior grand jury answers (1663a-1665a). The testimony was (1643a-1659a):

> THE COURT: Overruled.
>
> Q. Mr. Harris, in the course of this conversation with Mr. Andrews, was there a reference to him about the numbers business at the Copa Club?
>
> A. Never at no time.
>
> Q. Mr. Harris, do you recall testifying before the Grand Jury of this court?
>
> A. That's right.
>
> Q. Do you recall being sworn and testifying about these matters that I have questioned you about here today?
>
> A. That's right.
>
> Q. Do you recall stating at that time —
>
> MR. DAVIES: We object, if the Court please.
>
> THE COURT: Overruled.
>
> MR. COBB: We object.

THE COURT: What are the grounds of your objection?

MR. COBB: He is giving the answers to the question. There is no hostility.

MR. WEINTRAUB: We should be shown the minutes.

THE COURT: Approach the bench, please, gentlemen.

Reporter's note: the following occurred at the bench in the immediate presence of counsel and the Court, and in the presence but out of hearing of the jury:

THE COURT: I am going to permit him — this witness is on the stand and obviously according to the statement of the United States Attorney contradictory statements at a former hearing have been made, and I am going to permit them to cross-examine him, I am going to permit him to ask leading questions; I am going to permit him to treat him as a hostile witness, or as a witness that was offered by the other side. That is the law that has been established by numerous decisions of the Supreme Court of the United States, and irrespective of that it is the law in this case, and I am going to—and is going to continue to be the law in this case as long as this case is on trial. Let's don't have to go through this every single time we offer a witness.

MR. DAVIES. It isn't a question of going through it.

THE COURT: Sir?

MR. DAVIES: It isn't so much a question of going through this, but they have had this witness and they know what his testimony is and that's exactly the point.

MR. GOLDFARB: That's exactly the point, Your Honor.

THE COURT: That is the point he has not testified to like he told them he would. That is the whole point. I am going to permit them to cross-examine him, I will permit you to do the same thing when you

offer your witnesses.

MR. COBB: We don't know about his testimony.

THE COURT: Of course you don't, I don't either.

MR. WEINTRAUB: If Your Honor please, my last objection was not as to what Your Honor thinks. My last objection I was going to make was that Your Honor direct them to furnish us now a copy of the minutes of the Grand Jury.

THE COURT: I overrule your motion. That is the whole point.

MR. WEINTRAUB: Then, if Your Honor please, if they read something from him how do we know—and I am not making this charge against the Government.

THE COURT: I overrule your motion that—you didn't say anything about that, that was your objection?

MR. WEINTRAUB: I was just starting when Your Honor said come up to the bench.

THE COURT: I overrule your motion.

WHEREUPON THE COLLOQUY AT THE BENCH ENDED.

THE COURT: Wait, one of the defendants is out of the courtroom. All right, there he is, go ahead.

Q. Now, do you recall testifying on Dec. 20, 1961, before the United States District Court for the Eastern District of Kentucky, Grand Jury?

A. Yes, sir, I remember that.

Q. Do you recall being asked the question at that time: "Give us the details on that conversation," and answering, "He said the reason I have called you is because I have had so much trouble with the Copa Club not making any money, I have remodeled the place, spent a lot of money, and over the years it seemed to go into the red, and it can't get out of the red, and so he said, talking to different ones and knowing you, Jim, I think you could bring it out of the red. I have a lot of money stuck in the place, I don't need the Copa Club, I got the numbers going for me, but I got this

place and it has been a playground for the colored people for many years, I don't want to close the club up, I want to keep the colored trade here, so I would like for you to make money. So we discussed the thing, he said there was no numbers involved, so all I want you to do is book the shows and operate the club and so forth, so our discussion was I didn't think it was possible."

MR. DAVIES: Now, if the Court please, the defendants that I represent move the court to set aside the swearing of the jury and declare a mistrial because of the contents of the attorney of the United States in reading in full a question, with the obvious prejudicial import that this question has.

MR. GOLDFARB: This is an answer.

MR. DAVIES: Wait until I finish, Mr. Goldfarb. When the only possible things that he would have been permitted to ask under the law was some question which would contradict this statement, and a bare statement that the witness made, that there was no mention made of numbers. Now that—there was only two or three words answer, and Mr. Goldfarb has read a highly prejudicial question—prejudicial to every one of these defendants.

MR. WEINTRAUB: The defendants that I represent join in that motion, Your Honor.

THE COURT: Overruled.

Q. Do you remember making that answer to the question I read to you?

A. Well, you have asked me a lot, you read quite a bit there.

Q. Well, do you want me to go over it slowly and you can answer each sentence—each question?

Do you remember saying first—and this is in reference to your conversation with Mr. Andrews—

THE COURT: Let him take the record—do you have it there?

MR. GOLDFARB: Yes, sir.

THE COURT: Let him look at it and read it and see whether or not he made those statements.

Q. Showing you—

MR. WEINTRAUB: If Your Honor please, may I request the Court to make a motion that the defense be furnished—I don't know whether they have got it in the record when we were there before, that the defense be furnished with a copy of the minutes of the testimony of Mr. Harris before the Grand Jury because, for several reasons, first, it is impossible for the defense to know—I make no charge or accusation against the government.

THE COURT: Now approach the bench here a minute.

(Reporter's note: The following occurred at the bench.)

in the immediate presence of counsel and the Court, and in the presence but out of hearing of the jury:

THE COURT: Now what is the basis of your motion. What right have I got to require the United States to produce its records?

MR. WEINTRAUB: Well, if Your Honor please, for the simple reason how do we know—

THE COURT: Wait a minute. Don't argue the point you are making a speech before the jury and doing the same thing you are accusing the United States attorney of doing, making it appear that the United States is trying to conceal something from you. There is no law that I know of that permits the court to require them to do it. What is it?

MR. WEINTRAUB: Then, if Your Honor please, I would just like to say this, maybe it is a matter that law would have to be established, but I want to give you my reason. My reason is, number one, we have no reason if government counsel is misreading a question and answer. We have no way of knowing whether it is being taken out of context.

and continuing on page 1662a:

Q. Now, Mr. Harris, do you remember my last question to you. Do you want me to repeat it to you?

A. You can repeat it.

Q. Do you recall testifying before the Grand Jury on the date I have stated, and answering to this question "Give us the details of that conversation," the following answer: "He said the reason I have called you is because I have had so much trouble with the Copa Club, not making any money. I have remodeled the place, spent a lot of money and over the years it seemed to go into the red, and I can't get it out of the red, and so he said, talking to different ones and knowing, you, Jim, I think you could bring it out of the red. I have a lot of money stuck in the place, I don't need the Copa Club, I got the numbers going for me, but I got this place and it has been a playground for colored people for many years; I don't want to close the club up, I want to keep the colored trade here, so I would like for you to make money. So we discussed the thing, he said there was no numbers involved, all I want you to do is book the shows and operate the club and so forth, and so our discussion was I didn't think it was possible."

Do you remember being asked that question and making that answer?

A. I would like to refuse to answer that question on the grounds that I might be incriminated.

* * *

Q. Do you remember testifying before the grand jury being asked this question — "This was Frank Andrews saying this?" — Answer: "Yes, they came to me and said, why don't you get back in the bottoms where you belong, you've got that colored trade and no one is bothering you, why do you want to come up here in this end, and he also told me, he said, if I would go back to the bottoms they would put together

this numbers racket and consolidate it into one racket there was one or two bucking one another, and I said I didn't think it was possible to do it, so he said, I can't do it, and that was the end of it."

MR. DAVIES: We object.

MR. GOLDFARB: Your Honor every question I asked this witness has been based on these questions.

THE COURT: Overrule the objection.

Q. Do you remember being asked that question and making that answer?

A. I refuse to answer that question on the grounds that I might incriminate myself.

MR. DAVIES: Now, if the Court please, I want to renew my motion to set aside the swearing of the jury and declare a mistrial because of the reading of those questions.

THE COURT: Overruled.

MR. COBB: We join in the motion.

MR. WEINTRAUB: We join in the motion.

THE COURT: Overruled.

Members of the jury, you will not consider these questions as I have instructed you, you will not consider these questions as having any bearing upon the guilt or innocence of these accused; or any of them, they are asked solely here for the purpose of examining this witness, who the court says may be examined under the rules of evidence if he were a hostile witness.

Q. Mr. Harris, I will ask you if you recall being asked the question before the same Grand Jury at the same date: "Did he discuss with you anyone else taking over the Copa Club?" And making this answer: "Yes, I said, yes, I know a man I was just with last week that just lost this job, that is good on booking shows, he has been in the business for years around night clubs, has had many night clubs of his own, which I believe might fit the picture for you, I think I can

get him down and I think he can do the job for you. So he asked me who it was and I told him Al Holtzman out of Chicago, so I called Mr. Holtzman and he talked to Mr. Andrews and it was only a matter of a few days until Mr. Holtzman was working, running the club for Mr. Andrews." Do you recall being asked that question and making that answer?

MR. COBB: Objection.

THE COURT: Objection sustained. I don't think that is pertinent, and —

MR. DAVIES: I renew my motion to declare a mistrial, your Honor.

THE COURT: Overruled.

MR. WEINTRAUB: The defendant Walter Owens and other defendants join in the motion.

THE COURT: Overruled.

MR. COBB: We join in the motion.

* * *

The resultant error is denounced by Wigmore and in two Circuits, because, in fact, it brings before the trial jury matter that is incompetent.

Wigmore says (3 *Evidence* (3d ed. 1940) § 1043):

> "It ought to follow that, where the witness *now* claims to be *unable to recollect* a matter, a former affirmation of it should be admitted as a contradiction. But Courts have usually forbidden this, because the improper effect is apt to be to give a testimonial value * * * to the former statement; its aspect as a mere contradiction being naturally overshadowed."

Accordingly, both the District Court of Columbia Circuit and the First Circuit have held it reversible error to attempt to contradict with prior testimony a witness who at the trial is unable to recall the transaction about which he is being questioned.

In *Young* v. *United States,* 214 F.2d 232 (C.A. D.C.), it was held reversible error to read before the trial jury, on the theory of refreshing recollection, the witness' prior grand jury testimony (p. 237):

> "* * * Government counsel was permitted to read aloud much more of (the witness') grand jury testimony. This was not refreshing the witness' recollection. It was placing before the trial jury testimony previously given before a grand jury when there had been no cross-examination and defendant was not confronted with the witnesses against him."

In *Westinghouse Electric Corp.* v. *Wray Equipment Corp.,* 286 F.2d 491 (C.A. 1), similar use of a prior deposition, where of course the witness had been subject to cross-examination, was held error, the court saying (p. 493):

> "The cases are clear, however, that a deposition used in an attempt to refresh the witness' recollection is not itself admissible as evidence. * * * When a witness is unable to recall a past transaction, the majority of the cases do not allow a prior statement of the witness concerning that transaction to be introduced as a prior inconsistent statement."

And, after citing Wigmore, § 1043 (*supra*), the court added in a footnote, "Wigmore states that the basis of this exclusion is the possibility of improper testimonial effect being given to the prior statement. The instant case presents a forceful example of this danger" (286 F.2d at 493, footnote 2).

Indeed, the case at bar shows an *a fortiori* situation. As Wigmore noted (§ 1043 at p. 737), there may well be situations where the witness' presently asserted lack of

memory would be contradicted in fact by prior recent testimony showing an acute memory a little earlier. But when, as here, the witness invokes privilege, there is nothing whatever to be contradicted; the witness' invocation of his privilege does not contradict any testimony he gave earlier.

It is true that the court here admonished the jury that the subject matter of the questions, which set forth the witness' grand jury answers, were not to be taken as evidence against the defendants (1662a-1665a). But that is a distinction too delicate for lay jurors. In the words of Mr. Justice Cardozo, speaking for the Court in *Shepard* v. *United States*, 290 U.S. 96, 104:

> "Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds."

For, as has already been indicated, in this close case, where the jury deliberated for almost four days, it was especially prejudicial that Harris' grand jury testimony should be improperly read to the triers of fact by the prosecutor. *Namet* v. *United States*, 373 U.S. 179, 187; *Douglas* v. *Alabama*, 380 U.S. 415.

Sixth. Page 3 of the opinion of the Sixth Circuit Court of Appeals (*infra*, p. 8A) correctly stated that "conviction for conspiracy to evade gambling tax laws cannot be sustained absent proof 1) that defendants were parties to an agreement to defeat or evade the taxes, or 2) that defendants had knowledge that the taxes were due and were not being paid, plus conduct in furtherance of a plan to evade them."

As to Walter Owens, although he was a partner in the business, there was a total lack of evidence to connect him with any agreement to defeat or evade the taxes, or that

he had knowledge that the taxes were due and were not being paid, plus conduct on his part which even remotely indicated or pointed to him as directly or indirectly doing anything in furtherance of a plan to evade them. If a partner of Walter Owens, or some other individual, was doing this, even though the failure to pay the tax may have inured to the financial benefit of Walter Owens, it does not establish criminal scienter on his part.

As to Petitioner Russell A. Malone there is no evidence whatsoever to indicate that he was party to an agreement to defeat or evade taxes, or that he had knowledge that the taxes were due and were not being paid, plus furtherance of a plan to evade them. Where there is an absence of evidence, the trial court should have sustained the motion for judgment for acquittal, and failing that, the Sixth Circuit should have reversed. Petitioner Malone did not have a proprietary interest in the business (2153a). In spite of his voluntary announcements, he was himself only a customer and patron of the Club, and was not an employee of the Club (2153a-2154a).

There was absolutely no evidence from which it could even be inferred that these petitioners had any knowledge over what was being accounted for or reported. Even had it been shown they had such knowledge, there was absolutely no evidence that they participated in it in any way whatsoever, or did anything in furtherance of the plan, assuming such a plan existed.

Ingram v. *U. S.*, 360 U. S. 672 applies to these petitioners.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WALTER OWENS, Pro Se,
Petitioner
3966 Standish Avenue
Cincinnati, Ohio 45213

RUSSELL A. MALONE, Pro Se,
Petitioner
3547 Harvey Avenue
Cincinnati, Ohio 45229

APPENDIX A

Constitutional Provisions and Statutes Involved.

The Fifth Amendment provides in pertinent part:

> * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *

18 U.S.C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * *

Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201, provides in pertinent part:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony * * *

Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7206, provides in pertinent part:

Any person who—

(1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) *Aid or assistance.*—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;

* * *

shall be guilty of a felony * * *

Section 4401 of the Internal Revenue Code of 1954, 26 U.S.C. 4401, provides in pertinent part:

* * *

(c) Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all

such wagers received by him. (As amended Sept. 2, 1958, Pub. L. 85-859, Title I, § 151(a), 72 Stat. 1304.)

18 U. S. C. 2

Principals

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

26 U. S. C., Section 4411

Imposition of tax.

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U. S. C., Section 4412

Registration:

(a) Requirement. — Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company. — Where subsection (a) requires the name and place of business of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information. — in accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

26 U. S. C., Section 4421

For purposes of this chapter—

(1) Wager. — The term "wager" means—

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) Lottery. — The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include—

(A) any game of a type in which usually

(i) the wagers are placed,

(ii) the winners are determined, and

(iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and . . .

26 U. S. C., Section 7203

Willful failure to file return, supply information, or pay tax.

Any person required under this title to pay any estimated tax or taxes, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or taxes, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

47 U. S. C. 203 (c) (3)

Schedules of charges; filing with Commission; changes in schedules; overcharges and rebates; penalty for violations

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall . . . (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

APPENDIX B

Opinion Below.

No. 15623

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* FRANK J. ANDREWS, WALTER OWENS, PETER A. ANDREWS, JR., WILLARD WHITLEY, GUS POSTELL, LOUIS TYE, FRANK D. ANDRIOLA, RUSSELL A. MALONE, *Defendants-Appellants.*	APPEALS from the United States District Court for the Eastern District of Kentucky at Covington.

Decided June 17, 1965.

Before: MILLER, CECIL and EDWARDS, Circuit Judges.

EDWARDS, *Circuit Judge.* These appeals are from convictions for conspiracy to violate, and specific violations of the Internal Revenue Statutes by fraudulently concealing and witholding gambling excise taxes.

The first count of the indictments was a conspiracy count and the balance of the counts, 2 through 32, consist of the substantive counts of willful understatement of or failure to pay the excise taxes. Count 33 charged violation of the Federal Communications Act, and Counts 34 and 35 charged willful failure to register and pay the wagering occupational tax.

Defendant Frank J. Andrews was found guilty on Count 1 and received a sentence of five years and $10,000 fine. Defendant Daniel Andrews was severed because of his illness. The other seven defendants were found guilty on Count 1 and on a variety of the substantive counts. They were sentenced to terms of five years on each count for which they were convicted, except that Peter A. Andrews and Russell A. Malone were sentenced to only one year for their convictions on Counts 34 and 35. All seven were also fined $10,000 for conviction on Count 1. All of the sentences were made to run concurrently.

This trial was a sequel to large-scale,[1] illegal but wide open gambling operations in Newport, Kentucky. This record clearly establishes the nature and extent of the gambling. Indeed, no defendant, other than Frank Andrews, takes the trouble to deny being in the "business" of gambling during the time concerned. All do deny conspiring to evade federal wagering taxes and the substantive offenses charged.

Each of the several briefs filed on behalf of defendants argues the insufficiency of the evidence to support the verdicts and in this regard relies upon the applicable law as set forth in *Ingram* v. *United States,* 360 U. S. 672 (1959). In that case the United States Supreme Court affirmed convictions as to defendants Ingram and Jenkins (described as "entrepreneurs") and reversed as to defendants Smith and Law (described as "relatively minor clerical functionaries").

The Court's distinctions as set forth in the majority opinion of Mr. Justice Stewart thus:

---

[1] Computations of government evidence indicate total wagers during the times concerned of over five million dollars and a total tax evasion of over four hundred thousand dollars.

"But the evidence of agreement between Ingram and Jenkins to operate this gambling enterprise, which operation made them liable for federal taxes, and to conceal its operation and its income is clear on this record, and is virtually conceded by the petitioners. The evidence was sufficient to support a conclusion that they were engaged not only in a conspiracy to operate and conceal their gambling enterprise, but that they were also parties to an agreement to attempt to defeat or evade the federal taxes imposed upon the operators of such a business.

"As to Smith and Law, the case is quite a different one. While the record clearly supports a finding that Smith and Law were participants in a conspiracy to operate a lottery and to conceal that operation from local law enforcement agencies, we find no warrant for a finding that they were, like Ingram and Jenkins, parties to a conspiracy with a purpose illegal under federal law. Certainly there is nothing in the record to show that Smith and Law knew that Ingram and Jenkins had not paid the taxes, a fact obviously within the knowledge of the latter. . . ." *Ingram* v. *United States, supra* at 677.

Thus, we take it, convictions for conspiracy to evade federal gambling tax laws cannot be sustained absent proof 1) that defendants were parties to an agreement to defeat or evade the taxes, or 2) that defendants had knowledge that the taxes were due and were not being paid, plus conduct in furtherance of a plan to evade them.

We regard this record as establishing beyond all peradventure of a doubt at least two substantial, deliberate and interrelated schemes for large-scale federal tax evasion. The first such scheme relates to a method for reporting approximately one-quarter of the taxes actually due on the "day" numbers game and other related gambling activities. As testified to by Ruth Jane Siuda, one of the six girls who

"ran the work" on the "day" numbers, it was her job after the totalling of the work and after the hits had been determined to "pull the work." Her testimony leaves no doubt that this meant extracting the most convenient one-quarter of the bet slips so as to show a total take of $1,500-$2,000 per day, whereas in fact the daily total on this operation was $8,500. (See Appendix A.) The federal tax returns show clearly that taxes were paid only on the work thus "pulled."

The second major scheme for tax evasion involved the operation of a "night" numbers game. The record clearly establishes that no taxes were paid on this game at all, and it is argued to us that we should read the record as establishing that this game was within the exception to the wagering tax statute. Int. Rev. Code of 1954, § 4421(2)A.

The evidence, however, is overwhelmingly to the contrary, as obviously the jury found. It is patent that many of the persons participating in the "night" numbers operation were not on the premises at the time of the declaration of the winners and that the fact situation here involved large-scale telephone bet procedures, as well as the writing of bets off the premises.

As to Walter Owens, Willard Whitley, Peter Andrews, Jr., and Gus Postell, there can be no doubt about their status as entrepreneurs in relation to one or the other of the two major tax evasion schemes which we have referred to above. The records of the gambling partnerships, the tax return forms, and the testimony of Internal Revenue Supervisor William R. Tabb, and Agent Robert L. Thomas is ample to establish this.

We believe that the testimony of the Revenue Agents, plus Government Exhibit 305 (See Appendix B) is sufficient evidence from which the jury could have found Louis Tye and Frank ("Bud") Andriola guilty on the conspiracy

count as entrepreneurs likewise. Furthermore, their was testimony by a government handwriting expert that Exhibit 305 was in the handwriting of defendant Frank J. Andrews. (See Appendix C.)

As to Russell A. Malone, the testimony clearly indicates his role in advertising that no taxes were paid on the "night" numbers game, while at the same time assuring bettors that they did not in fact have to be present to win. Hence, his conviction on the conspiracy count seems warranted by the evidence herein. We regard it as consistent with the second of the two evidentiary standards set forth by Justice Stewart in the *Ingram* case.

As to Defendant Frank J. Andrews, the evidentiary situation relating to Count 1 is quite different. He was admittedly owner of "The Sportsman's Club" wherein these wide open gambling operations were conducted. It is his contention that his relationship to the club was entirely that of owner of the building and the landlord of those defendants who rented the premises. There is, however, strong circumstantial evidence that defendant Frank J. Andrews was more than a landlord. The unconcealed nature of the gambling operations conducted at his Sportsman's Club, his presence on the first day of the "consolidated operation" of the numbers business, his ordering the installation of the burglar alarm system at the new Sportsman's Club, his visits to the bookkeeping room where the girls "ran the work," the testimony which indicates that it was he who dealt with the competitive threat of Junior Andrews' location, the fact that he hired one of the telephone operators for the "night" numbers game, and the fact that substantial sums were paid out of the "day" numbers proceeds for taxes or rental owed by defendant Frank J. Andrews personally all represent facts from which this jury could have inferred that defendant Frank Andrews

had an entrepreneurial relationship to the gambling operation at the Sportsman's Club and knowledge of the two schemes for tax evasion which we have previously described.

Perhaps the most significant bit of evidence pertaining to Frank Andrews' knowledge and participation in the "day" numbers tax evasion scheme is the testimony which clearly establishes that Frank Andrews paid for construction of a hidden closet at the Sportsman's Club. This closet, controlled by an electrical attachment which "could be opened by touching two nails," was discovered at the time of the August 1961 raid. It contained the "pulled" and "bundled" work for July 1961. Testimony indicated that such "bundles" amounted to less than one-fourth of the total wagers. But the total of the "bundled" work found in the secret closet corresponded exactly with the amount of wagers reported for tax purposes for the month of July 1961.

In addition, testimony showed deposits of $103,000 in defendant Frank Andrews' bank account between October of 1960 and August of 1961. Many of these deposits to Andrews' account were made by an agent of the "day" numbers gambling partnership and over 100 of the checks deposited had symbols on them which were identified as the symbols of various numbers writers.

In short, we believe that the evidence of a substantial conspiracy to evade and defeat the payment of federal wagering taxes was overwhelming and that there was ample evidence to support the jury findings of guilty as to the conspiracy count of the indictment as to all of the defendants in this case within the rule of *Ingram* v. *United States, supra.*

As to the substantive counts, we do not contemplate such detail. Again, the proofs of willful evasion of taxes

offered by the government to support the various counts was overwhelming and uncontroverted.

The meticulous care with which the jury dealt with the individual indictments in this trial is demonstrated by the highly specific verdicts which were returned:

> "We the jury find the defendants as named.
> "Frank J. Andrews Guilty on Count 1—undecided on counts 2 thru 33.
> "Walter Owens guilty on counts 1 thru 33.
> "Peter A. Andrews, Jr., guilty on counts 1 thru 29 and 33-34-35.
> "Willard Whitley guilty on counts 1 thru 33.
> "Gus Postell guilty on counts 1 thru 15 and 33. Not guilty on 16 thru 32.
> "Louis Tye guilty on counts 1 thru 33.
> "Frank Andriola guilty on counts 1 thru 9 and 33.
> "Russell Malone guilty on counts 1 and 34, 35.
> "MELVIN HART, Foreman."

We have read the record and believe that there is ample proof to support the verdicts just recited.

The other important issue argued in this case pertains to the complaint, particularly by defendant Frank Andrews that pretrial and during trial publicity deprived him of due process of law and a fair and impartial jury trial.

This court has dealt recently and extensively with due process violation claims asserted to have been caused by press media prior to and during a criminal trial. *Sheppard* v. *Maxwell,* — F. 2d — (C.A. 6, 1965). Decided May 5, 1965.

It is certain that defendant's claim as to publicity do not begin to approach in quantity or possible prejudicial impact those asserted and rejected by the majority opinion in *Sheppard.*

As to the standards set in the dissenting opinion, the distinctions between the publicity impact upon this trial as compared to the Sheppard trial are numerous and important.

This was not a capital case.

There is no indication of public shock in this community over the crime of federal tax evasion being charged. This community had indeed been quite tolerant of defendant's "business."

It should particularly be noted in this regard that defendants never moved for a change of venue.

The trial judge was not a candidate for an immediately forthcoming judicial election; and certainly no one could say from this record that the press was ever allowed to become "the dominant factor" in Judge Swinford's courtroom.

The admonitions to the jury not to read the newspapers or listen to radio or TV were in unmistakable language and repeated at every adjournment. See *Coppedge* v. *United States,* 272 F. 2d 504 (C. A. D. C., 1959); *Estes* v. *United States,* 335 F. 2d 609 (C. A. 5, 1964), *cert. denied,* 379 U. S. 964 (1965).

The press comment on the trial, although frequently played on page one, was generally concerned with reporting what went into the trial record. The variances which were called to our attention do not in our judgment represent the "deliberate and highly prejudicial supplementation of the trial record" which was referred to in the dissenting opinion in Sheppard. See *Sheppard* v. *Maxwell, supra at —.*

This record does not disclose extrajudicial contacts with and communications to this jury.

Finally, we have every reason to believe that the jury

verdict in this trial was a "verdict . . . based upon the evidence developed at the trial." *Turner* v. *Louisiana*, 379 U. S. 466, 472 (1965).

While appellants rely upon *Briggs* v. *United States*, 221 F. 2d 636 (C. A. 6, 1955); *Marson* v. *United States*, 203 F. 2d 904 (C. A. 6, 1963), and *Stone* v. *United States*, 113 F. 2d 70 (C. A. 6, 1940), we find the factual distinctions between this case and those relied on to be both significant and determinative. The facts in this case pertaining to claimed prejudicial publicity are directly comparable to those in *Estes* v. *United States, supra.*

We also believe that the trial judge committed no error in denying the motion to suppress the evidence seized in this case. Rule 41 of the Federal Rules of Criminal Procedure recites in part:

> "The warrant shall be directed to a civil officer of these United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. . . ." Rule 41(c) Fed. R. Crim. P.

We have no doubt that the Internal Revenue Agents who served these warrants were properly designated under the terms of this rule. *United States* v. *Sigal*, 341 F. 2d 837 (C. A. 3, 1965); *United States* v. *Pasha*, 332 F. 2d 193 (C. A. 7, 1964), *Cert. denied*, — U. S. — (1965).

Further, we find no prejudicial error in Judge Swinford's charge when its language is taken as a whole and construed in context.

In this otherwise appropriate charge, however, the trial judge used two sentences which concern us. Referring to reasonable doubt he said: "It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror." We do not

believe that this language is desirable. While it may be argued that this simply tells the jury that it is not any captious doubt which should cause them to withold a verdict if otherwise convinced, it seems to us to place the Court in the position of urging a verdict with more emphasis than is appropriate.

These words also, however, must be viewed in relation to the totality of the Judge's charge on reasonable doubt. (See Appendix D.) Taken as a whole we believe that defendants suffered no prejudice therefrom.

In this regard and in relation to the numerous other issues presented by appellants which we have reviewed, we find no reversible error. Rule 52(a) Fed. R. Crim. P.; 28 U. S. C. § 2111.

Affirmed.

APPENDIX A.

(Testimony of plaintiff-appellee's witness Ruth Jane Siuda)

"Q. (By Mr. Lynch) How did that bundle come to be made?

"A. After we ran the work, the overlooks were pulled out of it, this, then I bundled the work.

"Q. Now, by 'bundled the work' what do you mean that you would do?

"A. Pull these books out of it and put a rubberband around it.

"Q. You would pull the books out?

"A. Yes.

"Q. By that you mean you would pull certain work out?

"A. Yes.

"Q. And how would the work ordinarily be placed, the work from which you would pull these books?

"A. It was all in boxes.

"Q. How many boxes for a day's work?

"A. Three.

"Q. Now, after you—observing the, this particular bundle dated 7/28/61, did you make the tape on that?

"A. Yes, I did.

"Q. How would you know which bundles to pull?

"A. Well, it was usually the same work all the time.

"Q. Well, would you have a particular figure or amount that you would pull?

"A. From 18 to $2,000.

"Q. And in addition to this work that you would pull in, the $18,000 to $2,000 that is a high figure, is that right? In other words, you would pull out a bundle that 18 would equal an $18 to $2,000 high?

"A. Yes.

"Q. What would be done with the other work?

"A. We would keep it three days and then put it in a box.

"Q. And what would happen to it after you put it in a box?

"A. I don't know what happened to it.

"Q. Well, what would you do with it?

"A. I wouldn't do anything with it, just put the work in the box.

"Q. Would you put the box in a particular place?

"A. Just left it in the office.

"Q. And when you came there the next morning would the box be there?

"A. No.

"Q. And the work that you put in this box after three days, the work that hadn't been pulled and bundled, were those the yellow bet slips?

"A. Yes.

"Q. Were those white sheets of paper the telephone work?

"A. Yes.

"Q. Now, do you know what proportion of the work that you would pull and bundle, what proportion that represented to the entire work for that particular day?

"A. Each day ran differently but I would say about a quarter of it.

* * *

"Q. Well, after you did this bundling operation from the previous day's work, how much work would remain after that?

"A. Oh, three-fourths of it.

"Q. And how many boxes similar to boxes such as are shown in government exhibit 199, would the remaining unbundled work fill?

"A. I don't know that it filled it but there would be two boxes.

* * *

"Q. Now, who would be the people who would go through the work and look for the hits?

"A. Who?

"Q. Who?

"A. All of us did it.

"Q. All of who?

"A. All the girls in the office.

"Q. Anyone else?

"A. We had about three girls, four girls come in.

"Q. Anyone else?

"A. Mr. Whitley, sometime.

"Q. Anyone else?

"A. Mr. Postell, sometimes.

"Q. Anyone else?

"A. No.

"Q. Now, after you went through and got the hits for each of the books, you would pull the tickets, mark them, somebody would compute the amounts of hits, is that correct?

"A. That's right.

• • •

"The Court: What was the total amount of money taken in by the house on the day numbers?

• • •

"The Court: Well, I mean from the time charged in this indictment, I don't think that is too material, but we will put it that way.

"Mr. Lynch: From the time she was in the Old Sportsman's Club Your Honor, that would cover it.

"The Court: From the time you were in the Old Sportsman's Club. Can you give me that? If you can't just say you can't.

"The Witness: I would say roughly about, roughly about $8500.00.

"The Court: Roughly $8500.00?

"The Witness: (Nods)."

APPENDIX B

(Testimony of Sidney William Macauley, Special Agent, Intelligence Division, Internal Revenue Service.)

"Q. (By Mr. Lynch) Now, turning to page 47 of this ledger, can you tell us what the figures are and will you demonstrate it on this machine and where the figures are obtained from?

• • •

"A. (Continuing) This page 47 in the journal is dated July 2nd. The expense column—your income column. This is the expense column. This is the difference. Now, let's

look at these figures here. Remember I went back a few pages, I went back five pages and the figure was $885 and some cents. The next page, the difference between expenses and income was $409 and then I read aloud the postings from the other pages, $1269, $1222, and this figure $2415.68 is shown here as $2415. If you were to add these five weeks figures, you would arrive at $6300. If you take 50% of it, divide it in half, half of $6300 is $3150. There is a small word here, which I don't know if you can read it, but it says 'house.' We have '10% Bud,' 10% of $3150 is $315, shown here. You subtract $3150 and $315 from $6300, you arrive at $2835, and it is marked over here, 'Junior and Louis.'

"If you divide the remainder, 2835, in half, you get $1417.50, Louis; $1417.50, Junior. . . ."

GOVERNMENT EXHIBIT No. 305

47

	July 2		2415.68
Jr. and Tye	300.00	Bar	1784.15
Band	700.00	Craps	1005.00
Buddy	75.00	Ex Craps	490.00
Duck	30.00	Door	481.50
Andrews	41.00	Booker	33.75
Perry	21.00	Beat Dealers	33.20
Tom	50.00	Nigh Roll	968.00
Pitt	50.00		
Ex Porter	25.00		4795.60
Lot man	20.00		
C. Johnson	25.00		
Worthy	15.00	2415.00	
D. Henny	130.00	1222.00	
RLD	54.00	1269.00	
Whisky	344.77	509.00	
Bar	307.25	885.00	
Coca Cola	26.40		
W. T. Wagner	9.10	6300.00	
New Way	31.51	3150.00	House
10% Tax	109.49	315.00	10% Bud
Fruit Products	15.40	2835.00	Jr. Lewis
		1417.50	Lewis
	2379.92	1417.50	Jr.

APPENDIX C.

(Testimony of plaintiff-appellee's witness Edwin C. Schroeder)

"Q. (By Mr. Lynch) Showing you Government Exhibit 305, which is a ledger, referring you to page 47, of that ledger, and specifically to that portion of the page which has a series of figures on the righthand side with notations, '315 house, 315 10% Bud, Junior, Louis, Louis and Junior,' have you seen and made an examination of that?

"A. Yes.

"Q. Now, have you arrived at an opinion as to whether Government Exhibit 314, the slip with the 'Frank J. Andrews, O.K.', Government Exhibit 210-A the spiral notebook, the first page of the spiral notebook; and Government Exhibit 305, page 47 and the listings, the figures, the notations thereon, were written by the same person who wrote the signature cards which are Government Exhibit 237, signed by Frank J. Andrews, the American District Telegraph contract, which is Government Exhibit 299, and the checks, forming Government Exhibit 301?

"A. I have an opinion.

"Q. What is that opinion?

"A. It is my opinion that the writer of the various standard documents signed Frank J. Andrews is the author of the notations in the ledger, the lower right half, and the small slip of paper and the notations in the spiral notebook."

APPENDIX D.

"In the first place, these defendants, and each of them, are presumed to be innocent until their guilt is established to your satisfaction to the exclusion of a reasonable doubt. That presumption of innocence starts with them at the beginning of the case and remains with them throughout the trial, and must be overcome by evidence, before you can accept as evidence as establishing their guilt. You must start with the presumption that these defendants, and each of them, are innocent until their guilt is established to your satisfaction, as I say, to the exclusion of a reasonable doubt.

"The term reasonable doubt, as used in this instruction, is best defined by a use of the term itself. Don't be confused by reasonable doubt. It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror. It is very easy for a person in his own mind to say, "Well, true, I have a reasonable doubt." Well, that is a rather variable thing, what is reasonable and what is unreasonable. But I think as common sense men of everyday affairs, you do understand the difference between what is reasonable and what is unreasonable, and so this term reasonable doubt means just what it says. It is a doubt based upon reason, not some inconsequential doubt that might flit through the mind of a juror, not some slight mental hesitation that might guide you in determining the less significant affairs of everyday life; but a doubt for which there is reason, such a doubt as would guide you in determining the course of action in the conduct of your ordinary everyday living; a

doubt based upon reason, not some shadowy, inconsequential misgiving.

"Few things are capable of proof to absolute certainty and while it is required of the law that the United States should establish its case to the exclusion of a reasonable doubt, it does not mean that the United States should prove its case beyond all doubt. And if it were so required, it would be practically impossible for the United States to successfully carry out the prosecution of the laws. So that term reasonable doubt is used in the sense which I have undertaken here to define it to you.

"Now, your verdict must be unanimous. You are not to arrive at a verdict by casting lots, by holding a primary election, by drawing straws, but your verdict must be unanimous. It must be the verdict of each juror. Each juror must make up his mind what the verdict should be. . . ."

APPENDIX C

Judgment.

(Filed June 17, 1965)

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

No. 15,623.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
FRANK J. ANDREWS, et al.,
Defendants-Appellants.

JUDGMENT.

Before: MILLER, CECIL and EDWARDS, *Circuit Judges.*

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX D

Order Sur Petition for Rehearing.

(Filed August 30, 1965)

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

No. 15,623.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK J. ANDREWS, et al.,
Defendants-Appellants.

ORDER.

Before: MILLER, CECIL and EDWARDS, *Circuit Judges.*

Petitions for rehearing having been received and considered by the court in the above-styled appeal,

IT IS HEREBY ORDERED that said petitions be DENIED.

Entered by order of the court:

/s/ CARL W. REUSS,
Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 607

FRANK J. ANDREWS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 703

GUS POSTELL AND WILLARD WHITLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 706

PETER A. ANDREWS, JR., LOUIS TYE, AND FRANK D. ANDRIOLA, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 707

WALTER OWENS AND RUSSELL A. MALONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 347 F. 2d 207.

JURISDICTION

The judgment of the court of appeals was filed on June 17, 1965. Timely petitions for rehearing were denied on August 30, 1965. The petition for a writ of certiorari in No. 607 was filed on September 24, 1965. In Nos. 703, 706 and 707, the time in which to file petitions for a writ of certiorari was extended by Mr. Justice Stewart to and including October 29, 1965, and the petitions were filed on or before that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

All petitioners except Frank J. Andrews (No. 607) raise the following issue:

1. Whether the evidence is sufficient to support the verdict of the jury.

All petitioners raise the following issues:

2. Whether the district court abused its discretion in refusing to allow *voir dire* examination of the jurors to determine if they had read newspaper articles regarding the progress of the trial.

3. Whether the district court erred in instructing the jury on willfulness, reasonable doubt, and the desirability of reaching a verdict.

4. Whether the district court abused its discretion in allowing the government to impeach the testimony of a witness by questioning the witness regarding his prior inconsistent grand jury testimony.

Petitioners Gus Postell and Willard Whitley (No. 703) raise the following issues:

5. Whether the district court abused its discretion in refusing to suppress evidence seized pursuant to a search warrant.

6. Whether the proof conformed to the indictment.

7. Whether the district court abused its discretion in denying severance.

STATEMENT

1. After a trial by jury in the United States District Court for the Eastern District of Kentucky, petitioners were convicted of various offenses under a thirty-five count indictment charging conspiracy to defraud the United States, evasion of the wagering excise tax, violation of the Federal Communications Act, and willful failure to register and pay the wagering occupational tax (R. 2273a–2306a, 2378a–2385a).[1] Each petitioner was convicted on the conspiracy count and sentenced on that count to imprisonment for five years and to pay a fine of $10,000. The prison sentences on the other counts, on which fines were not imposed, run concurrently with the sentences on the conspiracy count.[2]

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[1] References are to petitioners' appendix (page number followed by "a") and the government's appendix (page number followed by "b") in the court of appeals, both of which have been filed with this Court as a part of the record.

[2] In addition to the conspiracy count, counts 2 through 32 charged all petitioners except Malone with substantive monthly evasions of the wagering excise tax from February, 1959, through August, 1961, in violation of 26 U.S.C. 7201 and 18 U.S.C. 2.

Count 33 charged all petitioners except Malone with a substantive violation of the Federal Communications Act on June 26, 1961, in violation of 47 U.S.C. 203(c)(3) and 501, and 18 U.S.C. 2.

Counts 34 and 35 charged petitioners Peter A. Andrews, Jr. and Malone with willfully failing, during the month of July, 1961, to pay the wagering occupational tax and to register,

2. The case arose out of large-scale gambling operations[3] in Newport, Kentucky, which began in February, 1959, with the formation of a partnership between petitioners Owens and Whitley and Daniel Andrews (who was named in the indictment as a co-conspirator and co-defendant, but whose trial was severed due to illness) (R. 2424a). The partnership achieved a consolidation of several formerly separate numbers operations in the Newport area (See R. 130a-136a, 139a-183a). On February 2, 1959, the Owens-Whitley-Daniel Andrews partnership filed wagering tax Forms 11-C, listing themselves and petitioner Peter Andrews, Jr., as principals (R. 149a).[4] On the same date, that partnership rented from petitioner Frank Andrews the premises at 330 Central Avenue

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in violation of 26 U.S.C. 4411 and 7203, and 26 U.S.C. 4412 and 7203, respectively.

Petitioners were convicted on the substantive counts, as follows (R. 2379a–2385a):

Andrews Counts 2–29, 33–35
Tye Counts 2–33
Andriola Counts 2–9, 33
Owens Counts 2–33
Malone Counts 34–35.

[3] All petitioners concede the existence of large-scale, open gambling activities at all pertinent times under the indictment, but dispute their individual roles (Pet. No. 607, p. 4; Pet. No. 703, p. 20; Pet. No. 706, p. 5; Pet. No. 707, p. 5).

[4] On February 9, 1959, that partnership filed a supplemental Form 11-C, dropping Peter Andrews as a principal (R. 149a). This action was apparently the result of a dispute regarding the competitive situation with respect to gambling activities in the Newport area (R. 1838a–1839a, 1841a–1844a). The evidence, however, shows that Peter Andrews later participated in the conspiracy.

in Newport, known as the old Sportsman's Club, for use as a gambling casino (R. 233a, 2425a).[4]

Thereafter, as all petitioners concede, gambling activities were openly conducted on the premises. The building in which the casino was located was purchased by the Newport Municipal Housing Commission on August 17, 1960 (R. 1311a), after negotiations with Frank Andrews (R. 1308a), and the gambling operation was moved to an adjoining location, 333–339 Central Avenue, then known as the Copa Club, and thereafter known as the new Sportsman's Club. Rental payments were by checks on the account of Owens and Daniel Andrews (R. 1322a, 1334a). The telephone in the name of Frank Andrews at the old location was moved to his private office at the new location (R. 1550a, 1551a), and other telephones in the old location belonging to the Club were removed to the new location (R. 1566a–1567a).[5] On November 1, 1960,

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[4] During the material times covered in the indictment, legal title to the old Sportsman's Club was actually in petitioner Owens' name, although petitioner Frank Andrews was the real owner of the premises (R. 1311a–1312a, 1319a, 1334a, 1400a, 1406a). Petitioner Frank Andrews' defense was based upon the theory that he was merely the landlord and had no connection with the gambling operations (347 F. 2d at 210).

[5] The telephones are of significance because they were utilized to take bets and to inform callers of the winning numbers in both the day and night operations of the casino (*e.g.*, R. 325a, 1016a, 1812a–1814a; 43b). Petitioners contended at trial and in the court of appeals that the night operations were exempt from the wagering tax because the wagers were made, winners determined, and prizes distributed on the premises with all persons placing wagers present (see 347 F. 2d at 209; 26 U.S.C. 4421(2)(A)).

Frank Andrews arranged for the installation of a burglar alarm system for the office door at the new Sportsman's Club location (R. 1678a–1683a). Entry into the casino was accomplished through a door which was always bolted, and which was adjacent to a "one-way" glass window so that those inside could observe persons seeking to enter (R. 283a). The casino contained offices, work areas, and gambling equipment of various kinds, including the telephone banks and a machine which was used to select winning numbers (see R. 268a–289a; 92b, 94b). The gambling operations were conducted from that location until they were closed down on September 7, 1961 (R. 759a, 1954a), except for the period from August 5 to August 20, 1961, when the night numbers activity shifted (apparently because of a local police raid) to the second floor of an adjacent building, the Corner Liquor Store, which was operated by Frank Andrews' nephew, petitioner Andriola (R. 308a, 541a–542a).

3. Two principal methods were employed to evade the wagering taxes: (a) gross understatement of the business done in the daytime and (b) no payment of taxes whatsoever on the night operations.

a. As to the first method, testimony by three of the five or six office girls who worked at the casino established that they extracted and "bundled" the most convenient one-quarter of the bet slips each day in order to show a total business of approximately $1,500 to $2,000, whereas the actual total was approximately $5,500 (R. 635a–648a, 677a–678a, 691a, 698a, 731a–734a, 805a–814a, 816a–819a, 870a–884a). The remain-

ing slips, which represented the three-quarters not reported, were regularly removed or otherwise disposed of (R. 691a–692a, 711a–712a, 728a, 731a–734a, 888a–889a). The "bundled" work was reported as the total business of the day operation in the returns filed by petitioners Owens and Whitley and Daniel Andrews from February, 1959, through August, 1961 (R. 50b–81b). In a hidden compartment installed in a closet by petitioner Frank Andrews (R. 1774a), agents conducting a search, pursuant to a warrant, discovered day numbers work and a cardboard carton containing various "bundled" day numbers slips (R. 394a–397a, 437a–438a, 708a–726a, 875a–883a). In conferences with agents of the Internal Revenue Service, Owens, Whitley and Daniel Andrews stated that all bet slip records prior to November, 1960, had been destroyed in a fire at the old Sportsman's Club (R. 194a, 205a–206a). Although government agents were later given some records, they were never given those records which would have shown the actual gambling business being done by the operation (R. 199a, 206a, 226a; 12b *et seq.*).

b. Despite representations to the contrary made to Internal Revenue Agents by petitioner Owens and Daniel Andrews (R. 4b–5b),[1] many of the persons participating in the night numbers game were not on the premises when the winners were declared, and telephone betting was used on a large scale to handle the wagers of absent participants (*e.g.*, R. 286a, 294a–

[1] This was in support of a claim that the operations were exempt from taxes under 26 U.S.C. 4421(2)(A).

295a, 316a–317a, 322a, 325a, 1000a–1005a, 1016a–1060a, 1101a–1110a, 1178a–1178a, 1237a; 43b, 101b–102b, 111b–112b). Petitioner Malone, who acted as master of ceremonies during the casino's night operations (R. 285a, 306a, 576a, 614a), told people they need not be present to win during the night game (R. 306a, 336a). In searches pursuant to a warrant, various night numbers tickets, numbers books, tapes, tally sheets and other records were taken from the new Sportsman's Club indicating that there were some sixty-two writers in the night numbers operation (R. 2006a). In addition, miscellaneous numbers paraphernalia was found on the second floor of the Corner Liquor Store (R. 526a–542a), and while the agents were there numerous telephone calls were received inquiring as to the "night number" (R. 558a).

ARGUMENT

1. All petitioners except Frank Andrews (No. 607) question the sufficiency of the evidence to support their convictions. They acknowledge that large-scale gambling operations were being conducted on the premises involved (Pet. No. 703, p. 20; Pet. No. 706, p. 5; Pet. No. 707, p. 5), but contend that their various roles were other than those of conspirators. We discuss the evidence as to each petitioner separately:

a. Petitioner *Postell* admits that he applied for, and received, a wagering tax stamp as a partner with petitioner Whitley, but argues that such partnership never operated (Pet. No. 703, p. 20). He further con-

tends that he was merely the manager of the bar in the night operation (Pet. No. 703, p. 20). It is clear, however, that petitioner Postell was an equal partner with petitioner Whitley; that is, Whitley retained 50 percent of his earnings from the Owens-Whitley-Daniel Andrews partnership, and Postell received the other 50 percent of such earnings (R. 162a, 167a–168a, 205a, 2421a–2423a). Petitioner Whitley specifically stated to an agent of the Internal Revenue Service that he had a partnership with petitioner Postell to the extent of 50 percent of the net win of the day numbers, exclusive of any operating expense (R. 205a). The partnership of Postell and Whitley was confirmed by the Forms 11–C which they filed, giving their address as the old Sportman's Club (R. 2421a),[1] and by the subsequent Forms 11–C which they filed after the move, giving their business address as the new Sportsman's Club (R. 2422a–2423a).

Testimony of the office girls, moreover, established that Postell was more than a mere bar manager in the gambling operation; he actively handled the work sheets and records R. 916a–932a) and received wagers from a numbers writer (R. 1226a–1227a). Postell and Whitley received the daily consolidated sheets showing the whole day numbers operation (R. 831a–832a) and, with Daniel Andrews, they occasionally directed the work and activities of the office girls (R. 753a). Postell also helped in obtaining winning

[1] The address given on the return is 202 W. Southgate Street, but the same location was later known as 330 Central Avenue, the site of the old Sportsman's Club.

numbers (R. 1812a–1814a; 43b) and helped in looking for "hits" (R. 677a). While petitioner Postell was not directly shown to have been active at the casino during the night operations, the evidence demonstrates that the day and night operations were one and the same conspiracy.

b. Petitioner *Whitley* admits his interest in the day operation, but contends that he had no interest in the night business (Pet. No. 703, p. 20). He contends, therefore, that the evidence fails to show any intent on his part to evade or defeat the wagering tax (Pet. No. 703, p. 20). Substantial tax evasion took place during the daytime operation, however, and it is inconceivable that Whitley could have participated in the gambling operation to the extent that he did and yet be unaware of the true nature and status of the business. Whitley directed the work of the office girls (R. 635a–636a, 753a–754a), he looked for "hits" (R. 677a), he received worksheets turned over to him by employees of the enterprise (R. 631a–632a) and he maintained his partnership interest throughout the scheme's operation, as indicated by the returns filed with the Internal Revenue Service (R. 2404a–2420a; 50b–81b, 85b–88b) and his negotiations with the Newport Municipal Housing Commission regarding the rental of the new Sportman's Club (R. 1322a). Whitley's guilty knowledge of the nature of the operation is also suggested by the fact that he lied to an Internal Revenue Service agent, during the raid on the casino, about whether certain records which had been found by the agents in a concealed

compartment belonged to him or to petitioner Owens (R. 409a–410a). As in the case of petitioner Postell, it is of no significance that Whitley did not actively participate in the night operation, since the evidence as a whole clearly shows that the day and night operations were a single enterprise.

c. Petitioner *Peter Andrews* contends that he was merely a "Clerical Employee" and that as such he was not subject to the wagering tax and had no knowledge that it was not being paid (Pet. No. 706, pp. 28–29). The evidence, however, justifies the conclusion that Peter Andrews was an entrepreneur in the operation. He was originally one of the principals in the Owens-Whitley-Daniel Andrews partnership (R. 149a) and was dropped from that partnership (ostensibly, at least) because of his competitive proprietary interest at that time in other gambling activities in the Newport area (R. 1838a–1839a, 1841a–1844a). The evidence showed that he was later active in the conspiracy and received a share of the profits. He served as a cashier during the night operation (R. 1017a–1018a, 1087a–1091a), and he also received work sheets from the office girls (R. 574a), counted money, and handled various operations with bet slips (R. 274a, 277a, 284a, 288a, 304a, 342a). He worked with petitioner Malone in acting as master of ceremonies and drawing winning numbers (R. 279a, 284a, 288a, 317a, 320a, 322a). He received telephone bets (R. 357a). At the time of the raid by government agents, he and petitioner Tye ran to the ladies' restroom and there unsuccessfully attempted to hide some of the

night numbers telephone work (R. 380a–382a). A payroll compilation for writers and others involved in the night operation, which was seized by agents during the raid, was in the handwriting of Peter Andrews (R. 1986a–1990a). Other records in his handwriting, concerning the expenditures and income of the night operation, were discovered during the raid (R. 2059a–2060a, 2071a). Records of the enterprise showed that Peter Andrews' share of the "split" of the net profit over a five weeks period was 22½%, or $1417.50 (R. 1985a–1986a).

d. Petitioner *Tye* argues that he was merely a clerical employee and a night bartender (Pet. No. 706, p. 28) but records of the business indicate that he received 22½% of the profits (R. 1985a–1986a). The evidence also shows abundant activity on Tye's part in assisting Peter Andrews with the paperwork in connection with the bets slips and cash (R. 284a–304a, 307a, 339a, 380a–382a). Tye worked in the office of the club (R. 321a) and, as indicated above, ran with Peter Andrews to the ladies' room in an effort to hide certain telephone bet records when Internal Revenue Service agents raided the operation (R. 380a–382a).

e. Petitioner *Andriola* asserts that he was merely the operator of the Corner Liquor Store, and that there was no evidence which connected him with the operations of the gambling enterprise (Pet. No. 706, p. 28). The proprietary interest of petitioner Andriola in the enterprise, however, is nonetheless apparent. Andriola received 5% of the net profit of the enterprise, according to records seized during the

raid (R. 1985a–1986a).* At the time of the raid on the Corner Liquor Store, he at first lied to the agents, telling them that he knew nothing about the activity on the second floor (R. 529a), except that it was occupied by a theatrical booking office (R. 538a). Later, after the agents had discovered gambling paraphernalia on the second floor (R. 526a–542a) and confronted Andriola with the fact, he stated that there were three wagering tax stamps "up there" (R. 539a). During the raid, a number of telephone calls were received at the Corner Liquor Store inquiring about the "night number" (R. 558a).

f. Petitioner *Owens* admits that he was a partner in the gambling enterprise, but denies any participation in a scheme to evade the taxes (Pet. No. 707, pp. 38–39). In view of Owens' extensive proprietary interest in the operation, his assertions of ignorance were properly rejected by the jury. He participated actively in the operations of both the day and night numbers games by picking up the "bundled" work (R. 728a, 890a), hiring office girls (R. 626a), taking worksheets from the girls (R. 574a), acting as night cashier (R. 1017a–1018a), and selecting winning numbers from the machine used for that purpose (R. 1018a–1019a). His false and contradictory statements to the Internal Revenue Service agents who conducted the audit of the enterprise further tend to show guilty knowledge on his part (*e.g.*, R. 187a *et seq.*; 1b *et seq.*).

g. Petitioner *Malone* contends that he was only a customer and patron of the casino, who had no inter-

* Andriola was known by the nickname "Bud" (R. 369a, 567a), and the name "Bud" in the record in question refers to him.

est in the club and no knowledge of wagering taxes being due or unpaid (Pet. No. 707, p. 39). The evidence shows, however, that he took bets (R. 272a–273a, 286a–287a, 306a, 317a, 319a–320a, 323a, 327a, 335a–336a, 341a, 345a), using a code number for his work, just as the other writers did (R. 273a, 321a) and received a percentage of the bets he wrote. He knew that taxes were due, for when he accepted a bet from an Internal Revenue Service agent he asked for money to cover the tax (R. 308a, 325a–326a, 334a). As master of ceremonies at the night operation (R. 285a, 306a, 576a), he participated in the plan which made it appear that the betting was done on the premises (R. 285a, 296a, 316a, 322a, 362a; 93b). He told a revenue agent, however, that one did not have to be present to win (R. 306a, 336a). Thus, although there is no showing that he had a direct proprietary interest in the full scheme beyond what he earned as a writer, the evidence shows his knowing participation in the scheme to avoid paying federal taxes.

In the face of this evidence, petitioners' reliance on the case of *Ingram* v. *United States*, 360 U.S. 672, is misplaced. In *Ingram* the Court held that, as to non-proprietary employees, acts of concealment did not show knowledge of or intent to evade federal taxes since the concealment might have been merely to avoid detection by the State. Here, in contrast, all of the petitioners except Malone had a proprietary interest and there was direct evidence showing Malone's extensive connection with the whole operation and awareness of the federal tax obligation. In this

case, moreover, the gambling activities were largely open and unconcealed and the primary motive for the acts of concealment was thus not to conceal the operation generally, but to evade the federal wagering taxes due.

2. All petitioners contend that the district court abused its discretion in refusing to question the jurors during the course of the trial to determine whether they had read newspaper accounts of the progress of the trial. Because of pre-trial newspaper publicity regarding this case and petitioners' unsuccessful pre-trial motions for severance and continuance based on such publicity (R. 2331a–2334a), the district court was aware of the problems presented in this area. Consequently, it instructed potential jurors not to read newspaper articles regarding the case or listen to radio or television accounts of the case.[10] This initial instruction was repeated and emphasized at almost every recess for the lunch hour, and at each daily recess during the course of the trial which consumed eighteen days exclusive of the time spent in jury selection and deliberations (R. 147a, 234a, 267a, 309a, 353a, 402a, 482a, 547a, 653a, 751a, 837a, 1029a, 1100a, 1200a, 1295a, 1389a, 1617a–1618a, 1698a, 1822a, 1930a, 2075a, 2136a).[11]

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[10] These instructions appear in the Jury Voir Dire Transcript, not printed in the appendices filed with this Court, at pages 69–70.

[11] The following additional relevant references are to pages of the Transcript of Trial not printed in the appendices filed with this Court: Tr. 536, 550, 672, 882, 981, 1736, 2450, 2562, 2830, 3096, 3571, 3770, 3848, 3910.

On the sixth day of the trial, a newspaper article with the headlines: "United States Stopped From Showing Numbers Selection 'Rigged'" was brought to the attention of the district court, and counsel for petitioner Frank Andrews requested the district court to inquire whether any of the jurors had read the article (R. 354a–355a). The district court refused to conduct such an examination, noting that the jury had been again specifically admonished the previous day not to read any account of the trial in the newspapers and not to read any of the headlines (R. 354a–355a). The district court stated (R. 355a):

> I can't go on the assumption that they [the jurors] violate the instructions of the court, and I cannot see how the newspapers can keep from reporting this case. It is a case of public interest.

The district court went on to note that it did not intend to examine the jury every morning of the trial (R. 355a–356a).

Two days later, counsel for petitioner Frank Andrews again requested the district court to examine the jury as to whether any of them had read another article regarding the trial (R. 483a). While noting that the article contained "a rather glaring headline" (R. 483a), the district court stated that the mere fact of such newspaper coverage of the trial did not indicate that any of the jurors had violated the district courts admonitions, and remarked further (R. 484):

> * * * I am not going to have the jury catecized [*sic*] every morning before we start court

> to see whether or not they have violated their oath and violated their obligations as jurors to observe the court's instructions, simply because the newspapers are writing up this case.

Subsequent requests by petitioners for questioning of the jury in this regard were also denied on the same basis. Petitioners presented nothing in support of their requests for examination of the jury, other than the newspaper articles themselves.

In these circumstances, the trial court acted well within its discretion in refusing to interrogate the jurors. There was no reason to assume that the jurors had violated the constantly repeated admonitions of the trial court not to read the newspaper accounts of the case and the mere fact of publicity does not constitute a sufficient showing of bias and prejudice. *Estes* v. *United States*, 335 F. 2d 609 (C.A. 5), certiorari denied, 379 U.S. 964.[12]

3. All petitioners assert that the district court erred in its instructions on (a) willfulness, (b) reasonable doubt, and (c) the desirability of reaching a verdict.

a. The district court, in its main charge to the jury, repeatedly instructed that there could be a conviction only upon a finding of willfulness (R. 2190a–2191a, 2217a), intent to evade the taxes due (R. 2191a–2192a, 2217a), and knowledge that taxes were due and that the scheme's purpose was to evade them (R. 2196a, 2198a–2199a, 2217a). In supplemental instruc-

[12] There was nothing in this case which approaches the publicity involved in *Sheppard* v. *Maxwell*, 346 F. 2d 707 (C.A. 6), certiorari granted November 15, 1965 (No. 490, this Term).

tions, given in response to questions by the jury after a day and a half of deliberations, the district court reiterated such instructions on willfulness and knowledge (R. 2245a). Its subsequent refusal to give the jury further supplemental instructions on these elements was based on the fact that it had already thoroughly covered them, both in its original charge and in the supplemental instructions given (R. 2250a–2252a). The instruction "that a person is presumed to intend the natural consequences of his own deliberate acts" (R. 2191a–2192a) was given in that part of the instruction in which the judge was explaining that intent was not a material thing which could be be proved. The court explained that intent had to be judged "by the whole evidence in the case and by the actions and conduct of the defendants." Subsequently the court made it clear that the conspiracy charged had to be "an arrangement to deliberately set about to not report to the taxing authorities as the law required them to do" (R. 2198a). He told the jury that they were not concerned with the details of the operation but that the question was: "Did these defendants enter into an arrangement or an agreement to defeat the tax which was due the United States" (R. 2200a). The instructions more than adequately explained to the jurors that they must affirmatively find willful violation, knowledge of the taxes, and intent to evade before they could convict petitioners. See *United States* v. *Denton*, 336 F. 2d 785, 788 (C.A. 6); *Legatos* v. *United States*, 222 F. 2d 678, 685 (C.A. 9).

b. On reasonable doubt, the court charged (R. 2184a–2185a; emphasis supplied):

The term *reasonable doubt*, as used in this instruction, is best defined by a use of the term itself. Don't be confused by reasonable doubt. It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror. It is very easy for a person in his own mind to say, "Well, true, I have a reasonable doubt." Well, that is a rather variable thing, what is reasonable and what is unreasonable. But I think as common sense men of everyday affairs, you do understand the difference between what is reasonable and what is unreasonable, and so this term reasonable doubt means just what it says. It is a doubt based upon reason, not some inconsequential doubt that might flit through the mind of a juror, not some slight mental hesitation that might guide you in determining the less significant affairs of everyday life; but a doubt for which there is reason, such a doubt as would guide you in determining the course of action in the conduct of your ordinary everyday living; a doubt based upon reason, not some shadowy, inconsequential misgiving.

Few things are capable of proof to absolute certainty and while it is required of the law that ~~things are capable of proof to absolute certainty and while it is required of the law that~~ the United States should establish its case to the exclusion of a reasonable doubt, it does not mean that the United States should prove its case beyond all doubt. And if it were so required, it would be practically impossible for the United States to successfully carry out the prosecution of the laws. So that term reasonable doubt is used in the sense which I have undertaken here to define it to you.

Petitioners' complaints regarding the above instructions are insubstantial quibbles over the precise phrasing employed (Pet. No. 607, pp. 21–22; Pet. No. 707, pp. 26–27). The instructions were effectively phrased to make the concept meaningful to the jurors. See *Hooper* v. *United States*, 216 F. 2d 684, 689 (C.A. 10); *Bishop* v. *United States*, 107 F. 2d 297, 303 (C.A. D.C.).

c. In his initial instructions to the jury, the trial judge commented on the desirability of reaching a verdict (R. 2178a–2179a, 2185a–2187a) and, during the jury's deliberations, he expressed surprise at the length of time the jury was taking to reach a verdict (R. 2262a–2263a). No objection was made to these remarks, although there was objection to some substantive aspects of the supplemental charge (R. 2264a–2265a). Under the circumstances, petitioners' present objections come too late. Rule 30 F.R. Crim. P.

The record shows, moreover, that the remarks did not have the coercive effect petitioners now attempt to attribute to them. (Pet. No. 607, pp. 20–21; Pet. No. 706, pp. 22–23; Pet. No. 707, pp. 22–26). The questions asked by the jury, after it had deliberated on the case for some time, indicate that the jury was having difficulty with its verdict because of a misapprehension whether a verdict had to be uniform as to each count against all defendants (R. 2266a). Earlier exchanges between the jury and the trial judge show that the jury was considering the case very carefully and thoroughly, and that this was what was taking a great deal of time, rather than a general

deadlock of any kind (*e.g.* R. 2236a, 2238a, 2241a–2245a, 2248a, 2251a, 2254a, 2256a, 2264a–2266a). The foreman's remarks about not having "finished" (R. 2241a, 2254a), "[w]e're studying it" (R. 2236a), and "[w]e think we have made a lot of progress today" (R. 2254a), indicate merely that the jury was going through all of the evidence in great detail. The court sought only to clarify misunderstandings as to the jury's task.

4. On direct examination, the witness James Harris surprised the government by giving testimony substantially contradictory to that which he had given before the grand jury (R. 1653a–1654a). The district court properly allowed the government to treat the witness as hostile (R. 1654a) and impeach him by questioning him concerning his contradictory testimony. See *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925, 932 (C.A. 2), certiorari denied, 353 U.S. 984. When confronted with a reading of this testimony, the witness invoked his privilege not to incriminate himself, and refused to testify (R. 1663a–1665a). The purpose of reading Harris' grand jury testimony was to demonstrate the contradictions and to give the witness an opportunity to recall the contradictory statements and to explain or deny them. See *Burton* v. *United States*, 175 F. 2d 960 (C.A. 5), certiorari denied, 338 U.S. 909. The jury was expressly instructed that the subject matter of the questions setting forth the answers of the witness to the grand jury were not to be considered as evidence against petitioners (R. 1662a, 1665a).

5. Petitioners Postell and Whitley alone contend that the district court abused its discretion in refusing to suppress evidence which was seized pursuant to search warrants obtained by an Internal Revenue Service agent who observed the operations of the gambling casinos during July and August, 1961 (Pet. No. 708, pp. 5–7). The affidavit for the warrant showed that on twelve separate occasions, from July 19 to August 21, 1961, agent Owens of the Internal Revenue Service observed the operations of the casinos. On each occasion, he saw a minimum of twelve numbers writers soliciting wagers, checking through their numbers books, turning stacks of bet slips and cash over to petitioner Peter Andrews and others, and conducting various operations with adding machine tapes. The agent observed that some of those individuals turning in bet slips would leave before the drawing of the winning numbers, and that after the winning numbers were drawn stacks of mimeographed announcements of such numbers would be taken from the premises by various writers. Shortly after the time set for the drawing of the winning numbers, the numerous telephones would begin ringing almost continuously, and the individuals answering the telephones would recite the winning numbers and hang up without further conversations (R. 274a–375a). The agent also set forth his knowledge of the existence of wagering stamps issued to certain individuals doing business at the place observed. There was thus ample probable cause to believe that a number of persons (including petitioners Peter Andrews

and Malone) were carrying on a wagering business without having purchased wagering tax stamps, in violation of the law, and that the instrumentalities of the violation (the various numbers books, bet slips, adding machine tapes, etc.) were on the premises for which the warrants were to be obtained (between R. 2326a–2327a).[13] See *United States* v. *Ventresca*, 380 U.S. 102.

6. Petitioners Postell and Whitley contend that the proof shows multiple conspiracies. The evidence, however, justifies the conclusion that the operations of the petitioners were interlocking parts of a single tax evasion conspiracy—albeit one with various facets and techniques. Thus, there was no variance between the indictment and the proof, much less a prejudicial variance. *Berger* v. *United States*, 295 U.S. 78, 83.

7. There was no abuse of discretion in the district court's denial of severance to petitioners Postell and Whitley, the only petitioners now raising that issue. Their claim that they were not participants in the conspiracy charged was an issue for the jury at the trial. A motion for severance is addressed to the sound discretion of the trial court and the trial court's disposition of it will not be reviewed in the absence of a showing of abuse of discretion. *Opper* v. *United States*, 348 U.S. 84.

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[13] The pages in petitioners' appendix which contain the affidavits and warrants are not properly numbered in sequence with the other pages; they have been numbered 2325b through 2325n, and are located between 2326a and 2327a of petitioners' appendix.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON., JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
DANIEL H. BENSON,
Attorneys.

DECEMBER 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 607

FRANK J. ANDREWS, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITIONER'S REPLY MEMORANDUM

The thrust of the prosecution's arguments suggest that a few words in reply on behalf of the petitioner Andrews will be helpful.

First. Both parties agree that, although the defense regularly brought to the trial judge's attention virtually daily headlines that contained prejudicial and inadmissible matter, and requested that the jurors be

examined to ascertain whether any of them had read the offending articles, the judge refused to do so, insisting that the instructions he had given the jury were adequate (Pet. 5-6; Br. Op. 15-17).[1]

On this state of facts, the government argues (Br. Op. 17) that "the trial court acted well within its discretion in refusing to interrogate the jurors."

Our point, and no less than six circuits agree with us and disagree with the court below, and the government is that a trial court has no discretion when, as here, (a) the articles are prejudicial and (b) immediate request for interrogation of the jury is made. On such a showing, the trial judge must as a matter of law make inquiry.

1. We have already (Pet. 17-18) cited decisions from the District of Columbia, Second, Third, Fourth, and Seventh Circuits laying down the foregoing rule. Since then, the Seventh Circuit has reaffirmed the principle (*United States* v. *Largo,* 346 F. 2d 253, certiorari denied Nov. 5, 1965, No. 469, this Term), dividing only on whether the jurors should have been examined singly, out of the presence of all the others, or whether sequestration during interrogation was unnecessary. And the Fifth Circuit has adopted the majority rule, saying (*Adjmi* v. *United States,* 346 F. 2d 654, 659, certiorari denied October 11, 1965, No. 314, this Term).

> "When during the course of the trial counsel for the appellants brought to the court's attention the prejudicial newspaper accounts and moved for a

[1] "Pet." without more should be understood to refer only to the petition for certiorari filed on behalf of the Petitioner Andrews in No. 607.

> mistrial, the court had a duty to inquire whether the articles had created prejudice in the minds of the jurors."

Significantly enough, the Fifth Circuit in *Adjmi* did not follow its earlier ruling in *Estes* v. *United States,* 335 F. 2d 609, certiorari denied, 379 U.S. 964, which was cited below (Pet. App. 10A) and on which the prosecution still relies here (Br. Op. 17). For there, as we have pointed out (Pet. 18), there was no request until after the close of the evidence that any inquiries be directed to the jurors.

2. Also significantly, the Fifth Circuit in *Adjmi* specifically relied on and cited an earlier decision of the court below, *Marson* v. *United States,* 203 F. 2d 904 (C.A. 6). For it was the Sixth Circuit that pioneered and that until very recently consistently applied the doctrine (*Briggs* v. *United States,* 221 F. 2d 636, 640; *Stone* v. *United States,* 113 F. 2d 70, 77) that

> "The question is, not whether any actual wrong resulted * * * under the circumstances related, but whether it created a condition from which prejudice might arise or from which the general public would suspect that the jury might be influenced to reach a verdict on the ground of bias or prejudice."

It was only with *Sheppard* v. *Maxwell,* 346 F. 2d 707, 723-724, certiorari granted Nov. 15, 1965, No. 490, this Term, that the court below for the first time undertook to consider as discretionary what up to then it had held to be the mandatory duty of the trial judge, viz., to interrogate the jurors on request, once improper newspaper publicity had been brought to his attention, whether they saw the offending items and, if so, whether

they were influenced thereby. And that precise issue is now under review here.[2]

3. The present case is actually a stronger one than *Sheppard,* because since that decision involves collateral review of a State conviction there must be a showing that the impropriety reached constitutional proportions, whereas here, on direct review of a Federal conviction, a lesser showing, of non-adherence to the standards for a fair criminal trial in the courts of the United States, will suffice.

It may be that, so far as the quantum of prejudicial publicity is concerned, "each case must turn on its special facts" (*Marshall* v. *United States,* 360 U.S. 310, 312).[3] But surely there cannot be one rule in the Sixth Circuit and another in six others concerning the trial judge's duty when it is made manifest to him that there has been improper newspaper publicity concerning the case on trial. That question, plainly, requires resolution here, the more so since it is a regularly recurring one. Indeed, three of the cases we have discussed under the present heading—*Largo, Adjmi, Sheppard*—appear in a single volume of the Federal Reporter.

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[2] Among the questions presented in *Sheppard* v. *Maxwell* are these (Pet., No. 490, p. 2):

> "2. Did the trial judge fail adequately to protect the petit jury, once impanelled, from prejudicial extrinsic influence?
>
> "3. Did the trial judge fail to adequately interrogate the jurors when they had been exposed to prejudicial extrinsic matter through the news media during trial?"

[3] Def. Ex. X-4, was a newspaper story about an unsolved murder and unsolved bombings, none of which was referred to in the courtroom. (1823a-1824a)

Second. We showed in detail the course of the judge's charge on hung juries, which he deprecated; on the duty of a jury to reach agreement, which he stated in strong terms; and on reasonable doubt, which he substantially minimized (Pet. 7-10). We showed that those portions of the charge were severally contrary to what is regarded as law elsewhere (Pet. 20-22), and we showed how the impact of the erroneous supplementary charge blasted loose a verdict after the jury had by over three days of deliberation demonstrated its inability to arrive at a verdict without coercion (Pet. 20; R. 2262a-2267a). Yet the case was so close in respect of the present petitioner that he was convicted *only* on the conspiracy count, with the jury in disagreement as to each of the thirty-two substantive counts in which he was named (R. 2267a).

And yet, even though the court below deemed the language of the charge "not * * * desirable," because "it seems to us to place the Court in the position of urging a verdict with more emphasis than is appropriate," it held that the charge would still pass muster when "viewed in relation to the totality of the Judge's charge on reasonable doubt," (Pet. App. 11A).

Apart from the logical difficulty that "We cannot speculate as to which part would be accepted by the jury * * *" (*Price* v. *United States,* 200 F. 2d 652, 655 (C.A. 5)), and without in any sense undertaking to argue the merits at this juncture, we think that the totality of the foregoing adds up to a question that should be reviewed here.

One, the charge was clearly improperly coercive within this Court's recent ruling in *Jenkins* v. *United States,* 380 U.S. 445, where, significantly, the court of

appeals that was reversed had relied on the change-as-a-whole doctrine (330 F. 2d at 220-221). Two, the most objectionable part of the present charge, to which objection was articulately and specifically made, but without avail (R. 2262a-2263a, 2264a-2265a), came as the judge's last word, on the fourth day of the jury's deliberations. Thus it was most helpful in obtaining a verdict—and most prejudicial to this petitioner. The approach of the court below accordingly runs counter to this Court's teaching in *Bollenbach* v. *United States,* 326 U.S. 607, 612:

> "Particularly in a criminal case, the trial judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

CONCLUSION

For the foregoing additional reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia, Pa. 19107,
Counsel for the Petitioner.

December, 1965

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Nos. 607, 703, 706, 707

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1965

FRANK J. ANDREWS,
Petitioner,

vs.

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GUS POSTELL and WILLARD WHITLEY,
Petitioners,

vs.

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PETER A. ANDREWS, JR., LOUIS TYE, and FRANK D. ANDRIOLA,
Petitioners,

vs.

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WALTER OWENS and RUSSELL A. MALONE,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

THOMAS D. HIRSCHFELD
331 York Street
Newport, Kentucky 41071
Attorney for Petitioners

JAMES L. COBB, JR.
708 Coppin Building
Covington, Kentucky 41011
MORRIS WEINTRAUB
321 York Street
Newport, Kentucky 41071
DANIEL W. DAVIES
331 York Street
Newport, Kentucky 41071
Of Counsel

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

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October Term, 1965

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FRANK J. ANDREWS,

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No. 703

GUS POSTELL and WILLARD WHITLEY,

Petitioners,

vs.

UNITED STATES OF AMERICA.

No. 706

PETER A. ANDREWS, JR., LOUIS TYE, and FRANK D. ANDRIOLA,

Petitioners,

vs.

UNITED STATES OF AMERICA.

No. 707

WALTER OWENS and RUSSELL A. MALONE,

Petitioners,

vs.

UNITED STATES OF AMERICA.

On Petitions For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

---

PETITION FOR REHEARING

OPINION BELOW

The opinion of the Court of Appeals is reported at 347 F. 2d 207.

The respective Petitions for a Writ of Certiorari were denied by this Court on December 13, 1965.

Petitioners in each of the above cases respectfully pray this Court to reconsider its denial of said petitions, and to now grant them.

Reserving and relying upon the grounds set forth in the respective Petitions as originally filed, petitioners request a rehearing because:

1. The sworn admission by several jurors that they read newspaper articles throughout the trial, which fact has been ascertained by petitioners since the denial by this Court of the Petitions for a Writ of Certiorari, gives substance to the claim by petitioners that the repeated refusal of the trial court to examine the jurors during the trial to ascertain whether they had read such newspaper articles, as requested by counsel for petitioners, was error of a substantial nature.

2. The decision of the Sixth Circuit Court of Appeals upholding the trial court's failure and refusal to examine jurors during the trial to ascertain if they had read newspaper accounts when requested so to do by counsel for petitioners is in conflict with decisions of the Sixth Circuit itself and with decisions of other Circuits holding that it was the duty of the trial court to make such inquiry upon request.

3. The questions raised by petitioners concerning prejudicial newspaper publicity should be deferred and held in abeyance pending decision by this Court in the Sam Sheppard case, being No. 490 on the docket of this Court.

I.

The first issue raised in each of the Petitions for a Writ of Certiorari was the question of prejudicial newspaper publicity and the refusal of the trial court to examine the jury during the trial to ascertain if they had read the newspaper stories and accounts published during the trial.

The jury was not 'locked up' at any time during the lengthy trial lasting 18 court days, or during the three and one-half days of deliberations which followed.

On no less than nine (9) occasions during the trial, counsel for the petitioners brought to the attention of the trial court prejudicial newspaper headlines, some of them referring to matters that had been excluded by the trial court (354a, 483a, 654a, 1249a, 1390a, 1460a-1461a, 1995a-1996a, 2077a-2078a, 2136a-2137a, 2256a-2259a). In each instance counsel requested that the jurors be examined during the trial to ascertain whether they had seen the articles in question. In each instance the judge refused the request, saying on the first few of these occasions that he would not assume that jurors would not heed his admonition not to read about the case in the newspapers (354a-356a, 483a-484a).

On one occasion, the trial court inquired of counsel whether he was able to represent that the jurors had in fact violated the court's admonition, and counsel replied: "No, I do not know that. It would only be determined after we inquired as if *on voir dire*" (1996a).

Since the denial by this Court of the Petitions for a Writ of Certiorari, it has been ascertained that several jurors did read the newspaper articles. (Exhibits A and B). One juror admits he was influenced by what he read. (Exhibit "A").

On December 30, 1965, Harry J. Swing, a juror hearing the case in 1962, gave a statement, in his own handwriting,

under oath, that he had read newspaper articles during the trial, and that he was influenced by what he had read. A photo of this statement, sworn to before a notary public, is attached as Appendix 'A'. Because it is in handwriting, we reprint it for the convenience of this Court:

> "My name is Harry J. Swing and I live at 81 Windingway, Ft. Thomas, Kentucky. I was a member of the jury which convicted Frank Andrews and others in a trial in the Summer of 1962 in the Federal Court in Covington Ky. During the trial a lot appeared in the newspapers about what was going on at the trial and a lot about Mr. Frank Andrews, and the fellows on trial and their past troubles. I read these things in the newspapers during the trial and I know that others on the jury read the newspapers all the time during the trial of Frank Andrews. I know that a lot of times the lawyers would object to certain things and the Judge wouldn't let us hear about these things. But when the jury left the court room, the things that the Judge said we wouldn't hear were printed in the newspapers and I read them. I can truthfully and honestly say that the thing I read in the newspapers about Frank Andrews and the others on trial caused me to believe the worst about the defendants. I remember that remarks was made about these newspapers stories by other jurors during the trial and there were comments made about the newspaper stories during the time we were considering a verdict in the case, after the judge gave us the case to consider. I have made the above statement in my own handwriting and have made it of my own free will without either threat or promise. the above statement is true.
>
> Harry J. Swing.
>
> Sworn and subscribed to before me at 2:25 P. M. this day December 31, 1965. Howard N. Lucas, notary public, Commonwealth of Kentucky at Large. My Commission expires January 25, 1969."

On January 3, 1966, Russell H. Power, another juror hearing the case in 1962, gave a statement, under oath, subscribing his name thereto, stating that there was considerable information in the newspapers about the trial, and that he "could not help read the newspapers, sometimes it was accidental". His statement, attached as Exhibit 'B', is as follows:

> "My name is Russell H. Power, and I reside at 305 West Fourth, Augusta Kentucky. I was a member of the jury which convicted Frank Andrews and others in a trial in the summer of 1962 in the Federal Court in Covington Kentucky. During the trial there was considerable information in the newspapers about the trial and the defendants. I could not help read the newspapers, sometimes it was accidental. I have read the above and it is true. I made the above statement of my own free will without threat or promise.
>
> (SIGNED) Russell H. Power
>
> Sworn and subscribed before me this 3rd day of January 1966. (Signed) Howard N. Lucas Notary Public Commonwealth of Kentucky at large. My commission expires January 25, 1969."

This brings to sharp focus the issue of whether a trial court can refuse to question jurors concerning newspaper articles appearing during the trial, when those articles are claimed to be prejudicial, and when the Court is requested by counsel for petitioners to make such inquiry, simply on the presumption that jurors will heed the admonishment given by the court not to read newspaper articles concerning the trial.

Not a single time, nor in pursuant to any of the many requests made by counsel for petitioners during the trial, did the trial court make an inquiry, although it was ap-

parent that a juror had to be literally "deaf, dumb and blind" not to have seen these articles which bore glaring headlines and captions, in and of themselves prejudicial in nature.

The Sixth Circuit Court of Appeals in *Marson* v. *United States,* 203 F. 2d 904, 911, said that "Upon the showing of appellant's counsel, it was the duty of the court to interrogate the members of the jury to ascertain whether they had seen the newspaper articles and, if so, whether it had created any prejudice in their minds." But, the Sixth Circuit turned a deaf ear to their previous ruling in this case! Additional authorities which have insisted upon the protection prayed for in this cause are:

Briggs v. *U. S.,* 221 2d 636 (1955);
Stone v. *U. S.,* 113 F. 2d 70 (1940);
Marshall v. *U. S.,* 360 U.S. 310.

Except for the ruling now sought to be reviewed, we know of no appellate decision approving the denial of a motion for examination of the jury to ascertain whether any of the jurors had in fact seen the prejudicial publicity. The unanimity with which Federal trial judges throughout the land have made such inquiries even without express request once the existence of improper newspaper comment is made manifest during a trial, demonstrates that, by the concensus of judicial opinion, a generalized admonition not to read about the case in the newspapers is deemed wholly insufficient once the prejudicial accounts have in fact appeared.

In further factual support of the inflammatory and prejudicial nature of the newspaper stories read by some of the jurors of matters completely outside the court record was a headline and story "Ol Bohanan Murder Recalled" a

matter which occurred seven or eight years before the instant trial and a matter upon which no arrest or indictment was ever returned but which the newspaper story during the trial strongly intimated was related to the petitioners then on trial.

The issue here raised is one which affects the sound administration of criminal justice in Federal courts. In the interest of justice, the petitions for writs of certiorari should be granted.

II.

The decision of the Sixth Circuit is in conflict with its own decision in the *Marson* case, 203 F. 2d 904, and with other circuits which have uniformly held that it is the duty of the trial court to make inquiry to ascertain if a juror, during trial, has read prejudicial newspaper accounts.

Representative decisions include *Coopendege* v. *United States,* 272 F. 2d 504 (C. A. D. C.), where the court held inadequate a very generalized inquiry; *United States* v. *Bentvena,* 319 F. 2d 916, 934 (C. A. 2), where a juror who was shown the offending account by his wife but refused to discuss it with her was none the less discharged from the jury; *United States* v. *Vita,* 294 F. 2d 524 (C. A. 2), certiorari denied, 369 U. S. 823, where a juror who admitted reading the prejudicial article was excused and an alternate substituted; *United States* v. *Carlucci,* 288 F. 2d 691, 694-695 (C. A. 3), certiorari denied, 366 U. S. 961, where the judge "meticulously questioned" every juror; *United States* v. *Milanovich,* 303 F. 2d 626, 629-630 (C. A. 4), certiorari denied, 371 U. S. 876, where the court of appeals emphasized the duty of the trial judge to determine whether the prejudicial matter had reached any juror; and *Accardo* v. *United States,* 298 F. 2d 133, 136 (C. A. 7), where the court said that the district judge "should

have, by the careful examination of each juror, out of the presence of the others, determined the effect of the articles on those who had read them and whether they had discussed the articles with others." In that case, the Seventh Circuit said, in language fully applicable here, that (298 F. 2d at 136) "The judge's general admonitions at the beginning of the jury selection, his assumption of their effectiveness, and his instructions, were inadequate protection."

In numerous other cases involving prejudicial newspaper publicity, the reports show that the trial judge in fact inquired whether the offending articles had been read by the jury. e.g., *United States* v. *Agueci,* 310 F.2d 817, 831-832 (C.A. 2), certiorari denied, 872 U.S. 959; *Cohen* v. *United States,* 297 F.2d 760, 763-764 (C.A. 9), certiorari denied, 369 U.S. 865; *United States* v. *LaBarbera,* 273 F.2d 547 (C.A. 2); *United States* v. *Carruthers,* 152 F. 2d 512 (C. A. 7), certiorari denied, 327 U. S. 787; *Itow* v. *United States,* 223 Fed. 25, 28 (C. A. 9).

The present case which takes a wholly different approach in a situation that recurs again and again throughout a long trial is in clear conflict with decisions of courts in other circuits and accordingly calls for further scrutiny here.

III.

It is respectfully submitted that the entire question concerning prejudicial newspaper publicity and its effect on the administration of criminal justice, more particularly its effect on a person on trial, is one that has plagued the press, the members of the bar of all jurisdictions, the bar associations nationally and of the respective states. It will soon be decided, it is hoped and believed in the *Sam Sheppard* case, being No. 490 on the docket of this Court, certiorari having been granted.

The questions raised by petitioners concerning prejudicial newspaper publicity occurring during the trial should be deferred and held in abeyance pending decision by this Court in the *Sheppard* case.

CONCLUSION

This Petition for Rehearing should be granted, so that the issues presented by the Petitions can be fully briefed and set down for argument on the regular calendar.

Respectfully submitted,

THOMAS D. HIRSCHFELD,
331 York Street
Newport, Kentucky 41071
Counsel for Petitioners.

OF COUNSEL:
JAMES L. COBB, JR.,
Coppin Bldg.,
Covington, Kentucky 41011

DANIEL W. DAVIES,
331 York Street,
Newport, Kentucky 41071

MORRIS WEINTRAUB,
321 York Street,
Newport, Kentucky 41071

CERTIFICATE OF COUNSEL

I certify that this petition for rehearing is presented in good faith and not for delay.

THOMAS D. HIRSCHFELD

January, 1966.

My name is Harry J. Lewis and I live at 81 Winding Way Ft. Thomas Ky. I was a member of the jury which convicted Frank Andrews and others in a trial in the summer of 1962 in the Federal court in Covington Ky. During the trial a lot appeared in the news papers about what was going on at the trial and a lot about Mr. Frank Andrews, and the fellows on trial and their past troubles. I read these things in the new papers during the trial and I know that others on the jury read the news papers all the time during the trial of Frank Andrews. I know that a lot of times the Lawyers would object to certain things and the judge would order, let us hear about these things. But when the jury left the court room the things that the judge said we couldn't hear were printed in the news papers and I read them. I can truthfully and honestly say that the thing I read in the news papers about Frank Andrews and the others on trial caused me to believe the worst about the defendants. I remember that remarks was made about these news papers stories by other jurors during the trial and there were comments made about the news-paper stores during the time we were considering a verdict in the case, after the judge gave us the case to consider. I have made the above statement in my own hand writing and have made it of my own free will without either threat or promise. The above statement is true. Harry J. Lewis.
Sworn and subscribed before me at 3:25 P.M. this day December 31, 1965 I [illegible] a notary public Commonwealth of Kentucky at Large. My Commission expires January 25, 1969.

EXHIBIT----------A

My name is Russell H. Power, and I reside at 305 West Fourth Augusta Kentucky. I was a member of the jury which convicted Frank Andrus and others in a trial in the summer of 1962 in the Federal Court in Covington Kentucky. During the trial there was considerable information in the newspapers about the trial and the defendants. I could not help read the newspapers, sometime it was accidental. I have read the above and it is true. I made the above statement of my own free will without threat or promise.

Russell H Power. . . Sworn and subscribed before me this 3rd day of January 1966 Howard V. Sacks Notary Public commonwealth of Kentucky at large my commission expires January 25, 1969

EXHIBIT ----------B